

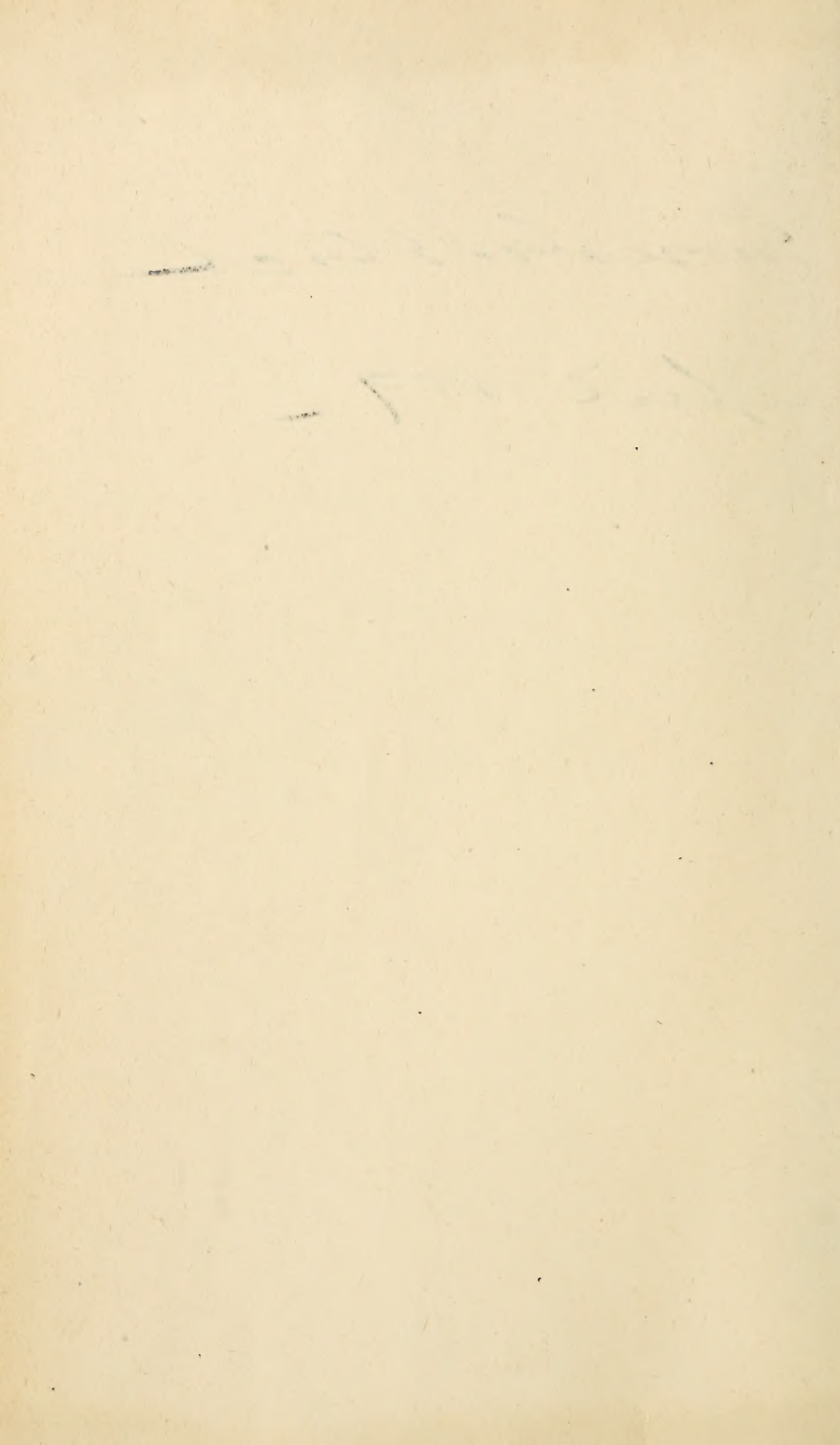


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A TREATISE
ON THE
LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH
ILLUSTRATIONS FROM AMERICAN AND OTHER FOREIGN
LAWS.

From the Eighth English Edition.

BY
HIS HONOUR JUDGE PITT TAYLOR.

VOL. II.
PART I.

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CONTINUATION OF PART II.

RULES GOVERNING THE PRODUCTION OF TESTIMONY.

CHAPTER XVIII.

MATTERS REQUIRING TO BE EVIDENCED BY WRITINGS.

§ 972. IN the present chapter will be considered briefly those matters, for the proof of which the law requires a *written document* more or less formally executed; and, first, as to those transactions which, at common law, are required to be evidenced by deed. The most important of these relate to *incorporeal rights*: and it is now clearly determined, that all such rights, whether they amount to an interest in land or not, lie in *grant*, and as such can neither be created, assigned, demised, nor surrendered, except by *deed*.¹ The term “incorporeal rights” includes among other things, advowsons, ferries,² rents, interests in lands not in possession, as remainders, or reversions for life or years, profits à prendre, easements, and the like; and the principle, which requires such rights to be evidenced by documents under seal, does not depend on the quality or amount of interest granted, transferred, or surrendered, but on the nature of the subject-matter; a right of common, for instance, which is a profit à prendre, or a right of way, which is an easement or right in nature of an easement, can no more be granted or conveyed for life or for years or even for days without a deed, than in fee-simple.³

¹ Wood v. Leadbitter, 13 M. & W. 842, 843; Hewlins v. Shippam, 5 B. & C. 229; Co. Lit. 337 b. 338 a; 2 Shep. Touch. 300; 1 Wms. Saund. 236 a; Lyon v. Reed, 13 M. & W. 303—305; Bird v. Higginson, 2 A. & E. 696; 6 A. & E. 824, S. C.; Mayfield v. Robinson, 7 Q. B. 486; Roffey v. Henderson, 17 Q. B. 574.

² Mayfield v. Robinson, 7 Q. B. 486.

³ Wood v. Leadbitter, 13 M. & W. 843, per Alderson, B. See Williams v. Morris, 8 M. & W. 488; Perry v. Fitzhowe, 8 Q. B. 757, 777, 778.

§ 973. So strictly has this rule been interpreted, that even a ticket of admission to a theatre during a season, or to a grand-stand during the races, can afford no irrevocable title to the party purchasing it; but after notice of revocation, he can be removed by the owner of the premises, without assigning any reason, and without so much as returning the price of the ticket; and his only remedy, if any, is to bring an action, founded on a breach of contract, against the person who sold the ticket, or against those who authorised its sale.¹ It further deserves notice, that, while a mere personal licence of pleasure, as the privilege of hunting, will be revocable, whether granted by parol, or under seal,² the privileges of hunting, fishing, or shooting, if granted to a party and his assigns, and if coupled with a right of taking away the game when killed, will be profits à prendre, and as such may be, and can only be, irrevocably granted by deed.³ § 892

§ 974. Although a parol demise of an incorporeal hereditament passes no estate, it by no means follows, that the party who actually occupies and enjoys the thing so demised, is protected from all liability to pay for his occupation and enjoyment; and the better opinion is, that the grantor will still be entitled to recover from the grantee, in a count for use and occupation, such reasonable sum as the jury shall assess, for the actual enjoyment of the hereditament demised.⁴ § 893

§ 975. With respect to the transfer of personal property the law appears to be as follows:—a *donatio mortis causâ*,—which, by the § 894

¹ *Wood v. Leadbitter*, 13 M. & W. 838, 843—855; overruling *Taylor v. Waters*, 7 Taunt. 374; and explaining *Webb v. Paternoster*, Palm. 71; Roll. R. 143, 152; Noy, 98; Poph. 151, and Godb. 282, S. C.; *Wood v. Lake*, Say. 3; and *Wood v. Manley*, 11 A. & E. 34; 3 P. & D. 5, S. C. See, also, *Taplin v. Florence*, 10 Com. B. 744.

² *Wood v. Leadbitter*, 13 M. & W. 844, 845; *Wickham v. Hawker*, 7 M. & W. 79; *Thomas v. Sorrell*, Vaugh. 351.

³ *Doe v. Lock*, 2 A. & E. 705; *Wickham v. Hawker*, 7 M. & W. 63; recognised in *Durham & Sunderl. Ry. Co. v. Walker*, 2 Q. B. 967; *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824, S. C.; *Barker v. Davis*, 34 L. J., M. C. 140.

⁴ *Bird v. Higginson*, 2 A. & E. 626; 6 A. & E. 824; 4 N. & M. 506, S. C.; *Thomas v. Fredericks*, 10 Q. B. 775. See post, §§ 981—984, 1036, 1043.

way, must be clearly ¹ proved to have been given in contemplation of death,² and which, unless made *bonâ fide* three months before the deceased died, must be accounted for at the Inland Revenue Office, and will be liable to Probate duty. See 44 V. c. 12, §§ 38, 39,—passes no property to the donee without delivery;³ and it is immaterial whether at the time of the gift the chattel be in the actual possession of the donor or of the donee.⁴ The gift of a chattel *inter vivos*, whether made verbally or in writing without deed, is not binding, unless there be either an actual transfer of the property, or a declaration of trust respecting it;⁵ neither will the courts substitute one of these modes of dealing for the other in order to effectuate the gift, when by so doing the real intentions of the donor would be defeated.⁶ For the judges cannot recognise any rule of equity which would enable them, by such a contrivance, to perfect an imperfect gift, even though it should be in favour of a *bonâ fide* present made by a husband to his wife. Still, such a gift as that just referred to will be deemed irrevocable, if it be effected by a declaration of trust, or if it be either accompanied by delivery of possession,⁷ or possibly if it be followed by some statement or act on the part of the donee testifying his acquiescence in the gift.⁸ A similar gift, if made by deed, is complete without any delivery by the donor or acceptance by the donee, until disclaimer by the latter;⁹ but such disclaimer may be by parol.¹⁰ An assignment of chattels for a valuable consideration by way of mortgage will be binding upon the parties, though the instrument be not under seal, and though it be unaccompanied by any actual or symbolical delivery.¹¹

¹ See *M'Gonnell v. Murphy*, I. R., 3 Eq. 460.

² *Cosnahan v. Grice*, 15 Moo. P. C. R. 215.

³ *Smith v. Smith*, 2 Str. 955; *Bunn v. Markham*, 2 Marsh. 532; 2 M. & Gr. 691, n. a; *Powell v. Hellicar*, 26 Beav. 261; *McGonnell v. Murphy*, I. R., 3 Eq. 460. See *Moore v. Moore*, 43 L. J., Ch. 617; 18 Law Rep., Eq. 474, S. C.; *Rolls v. Pearce*, L. R., 5 Ch. D. 730; 46 L. J., Ch. 791, S. C.; *Austin v. Mead*, L. R., 15 Ch. D. 651, per Fry, J.; 50 L. J., Ch. 30, S. C.

⁴ *Shower v. Pilek*, 4 Ex. R. 478.

⁵ *Milroy v. Lord*, 4 De Gex, F. & J. 264, 274, per Turner, L. J.

⁶ *Breton's Estate*, in re, L. R., 17 Ch. D. 416, per Hall, V.-C.

⁷ See *Bourne v. Fosbrooke*, 18 Com. B., N. S. 515.

⁸ 1 Com. B. 381, n. b, & 2 M. & Gr. 691, n. a; cited by Parke, B., in *Flory v. Denny*, 7 Ex. R. 583; questioning *Irons v. Smallpiece*, 2 B. & A. 551.

⁹ *Id.*; *Siggers v. Evans*, 5 E. & B. 367. See *Hobson v. Thellusson*, 36 L. J., Q. B. 302; 2 Law Rep., Q. B. 642, S. C.

¹⁰ *Id.*; *Shep. Touch*. 285.

¹¹ *Flory v. Denny*, 7 Ex. R. 581.

§ 976. Another class of transactions, which, at common law, are in general required to be evidenced by deeds, consists of contracts made, and acts done, by *corporations*.¹ The general rule of law, that a corporation aggregate cannot express its will or do any act except under seal, may be traced to a remote antiquity, and is founded on the assumption, that the concurrence of the whole body corporate in any particular act, can best be authenticated by the affixing of the corporate seal to the document relating to such act.² In short, the common seal has been termed, in the quaint phraseology of olden times, “the hand and mouth of the corporation.”³ This rule has been denounced in the United States as highly impolitic, and is now almost entirely superseded in practice;⁴ but in England, though it has been described by one of our most accomplished judges as “a relic of barbarous antiquity,”⁵ it still partially holds its ground, and affords opportunities to corporate bodies, by the aid of unscrupulous counsel, to commit from time to time the most startling frauds. § 895

§ 977. From the earliest traceable periods the rule in question has, indeed, been subject to certain *exceptions*, which rest upon a § 896

¹ Arnold *v.* May. of Poole, 4 M. & Gr. 860; May. of Ludlow *v.* Charlton, 6 M. & W. 815; Church *v.* Imp. Gas Light & Coke Co., 6 A. & E. 861; Paine *v.* Stand Union, 8 Q. B. 326; Lamprell *v.* Billericay Union, 3 Ex. R. 283, 306. As to contracts made by the Metrop. Board of Works, see 18 & 19 V., c. 120, § 149.

² May. of Ludlow *v.* Charlton, 6 M. & W. 823, per Rolfe, B.; Church *v.* Imp. Gas Light & Coke Co., 6 A. & E. 861.

³ R. *v.* Bigg, 3 P. Wms. 423, cited by Tindal, C. J., in Gibson *v.* E. India Co., 5 Bing. N. C. 269. As to when a corporation may adopt a private seal, see ante, § 149.

⁴ In 2 Kent, Com. 289, it is said, “At last, after a full review of all the authorities, the old technical rule was condemned as impolitic, and essentially discarded; for it was decided by the Supreme Court of the United States, in the case of the Bk. of Columbia *v.* Patterson, 7 Cranch, 229, that whenever a corporation aggregate was acting within the range of the legitimate purposes of its institution, all parol contracts made by its authorised agents were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises, for the enforcement of which an action lay.” See, also, 6 A. & E. 837, 838, per Patteson, J.

⁵ South of Irel. Colliery Co. *v.* Waddle, 4 Law Rep., C. P. 618, per Cockburn, C. J., in Ex. Ch.

principle of convenience, amounting almost to necessity,¹ and which relate either to *trivial matters of frequent recurrence*, or to *such affairs* as from their nature do not admit of delay.² Thus,—to borrow the language of Mr. Baron Rolfe, in a well-considered case,³ —“A corporation, it is said, which has a *head*, may give a personal command, and do small acts; as it may retain a servant. It may authorise another to drive away cattle damage feasant, or to make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters the head of the corporation seems, from the earliest times, to have been considered as delegated by the rest of the members to act for them.”

§ 978. His lordship then proceeds to point out, that⁴ “in § 897 modern times, a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by Act of Parliament, for the purpose of carrying on *trading speculations*; and where the nature of their constitution has been such as to render the *drawing of bills*, or the *constant making of any particular sort of contracts necessary for the purposes of the corporation*, there the courts have held that they would imply in those, who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist.” These observations are confined to *trading companies*, but several later decisions seem to warrant the assumption, that the rule may be now generally stated as applicable alike to all *corporations aggregate*, whenever the making of a certain description of contract is necessary and incidental to the purposes for which the corporation was created.⁵

¹ Church v. Imp. Gas Light & Coke Co., 6 A. & E. 861, per Ld. Denman, cited by Rolfe, B., in May. of Ludlow v. Charlton, 6 M. & W. 822.

² Arnold v. May. of Poole, 4 M. & Gr. 895, per Tindal, C. J.; De Grave v. May. of Monmouth, 4 C. & P. 111.

³ May. of Ludlow v. Charlton, 6 M. & W. 821.

⁴ Id.

⁵ Clarke v. Cuckfield Union, 1 Bail Ct. Cas. 85, 86, 89, per Wightman, J., (3709)

§ 979. In accordance with the rule thus expounded, it has been held that an action will lie against a gas company for meters sold to them,¹ and an action is maintainable by them against the consumer, either for not accepting gas according to his agreement,² or for the price of gas supplied to him.³ So, where a colliery company had verbally contracted with an engineer for the erection of machinery to work their mine, and had paid him part of the price, they were permitted to recover damages from him for breach of this agreement.⁴ Actions have also been held to lie against the guardians of the poor of an union, who are constituted a corporation by the Act of 5 & 6 W. 4, c. 69, s. 7, in one case for iron gates,⁵ in another for water-closets,⁶ and in a third for coals,⁷ which had respectively been supplied under parol contracts for the union workhouse. So, an accountant, employed to audit the books of a poor-law union, has been permitted to maintain an action for work done as against the guardians, although the contract was not under seal.⁸ A surgeon, too, who had been retained by the general manager of a railway to attend a servant of the company injured by an accident on the line, was held entitled to recover his charges, though he had only been verbally engaged.⁹ So, a parol contract made by the directors of a chartered Navigation

in an elaborate argument. See, also, *Nicholson v. Bradfield Union*, 35 L. J., Q. B. 176; 1 Law Rep., Q. B. 620; 7 B. & S. 744, S. C.; *Wells v. Kingston-upon-Hull*, 10 Law Rep., C. P. 402; 44 L. J., C. P. 257, S. C.

¹ *Beverley v. Lincoln Gas Light & Coke Co.*, 6 A. & E. 829; 2 N. & P. 283, S. C.

² *Church v. Imp. Gas Light & Coke Co.*, 6 A. & E. 846; 3 N. & P. 35, S. C.

³ *City of Lond. Gas Light & Coke Co. v. Nicholls*, 2 C. & P. 365.

⁴ *South of Irel. Colliery Co. v. Waddle*, 3 Law Rep., C. P. 463; 37 L. J., C. P. 211, S. C.; 4 Law Rep., C. P. 617, S. C. in Ex. Ch.; and 38 L. J., C. P. 338.

⁵ *Sanders v. St. Neot's Union*, 8 Q. B. 810. But see *Smart v. West Ham Union*, 10 Ex. R. 687.

⁶ *Clarke v. Cuckfield Union*, 1 Bail Ct. Cas. 81. See *Pauling v. Lond. & N. West. Ry. Co.*, 8 Ex. R. 867.

⁷ *Nicholson v. Bradfield Union*, 35 L. J., Q. B. 176; 1 Law Rep., Q. B. 620; 7 B. & S. 744, S. C.

⁸ *Haigh v. North Bierley Union*, 28 L. J., Q. B. 62; E. B. & E. 873, S. C.

⁹ *Walker v. Gt. West. Ry. Co.*, 36 L. J., Ex. 123; 2 Law Rep., Ex. 228, S. C. This case overrules *Cox v. Midl. Ry. Co.*, 3 Ex. R. 268; 5 Rail. Cas. 583, S. C., so far as relates to the necessity of a sealed contract.

Company, by which they agreed to pay a person a certain salary in consideration of his going to Sydney and bringing home one of their ships, has been enforced as against the company, the plaintiff having performed his part of the agreement.¹ And when the same company had bought some ale for the use of the passengers on board one of their steamvessels, and had paid for it, they were allowed to recover damages from the vendors on account of the ale being unfit for use, though the agreement for the purchase was not under seal.²

§ 980. But, on the other hand, a contract with a *copper* mining 2 898
company for a supply by them of *iron* rails;³ a contract with a water company for the supply to them of iron pipes;⁴ a contract for erecting engines and machinery for a water company;⁵ a contract with a railway company to execute extensive repairs on their permanent line of rails;⁶ a contract with guardians of the poor to make a map of the rateable property of a parish in the union;⁷ a contract with guardians to do some extra work in building a poor-house;⁸ and a contract with guardians for the engagement of a clerk to the master of a workhouse,⁹—have each and all of them been held to relate to matters, which were not of such frequent occurrence, or of so small importance, or so essentially necessary for the purposes for which the corporations were respectively instituted, as to be taken out of the general rule requiring the contracts of corporations to be under seal;¹⁰ and even before the

¹ *Henderson v. Austral. Roy. Mail St. Nav. Co.*, 5 E. & B. 409. See, also, *Reuter v. Elect. Teleg. Co.*, 6 E. & B. 341.

² *Austral. Roy. Mail. St. Nav. Co. v. Marzetti*, 11 Ex. R. 228.

³ *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

⁴ *E. Lond. Waterw. Co. v. Bailey*, 4 Bing. 283; 12 Moore, 532, S. C.; explained by Ld. Denman in *Church v. Imp. Gas Light & Coke Co.*, 6 A. & E. 860—862. This case would seem now to be overruled. See ante, p. 840, n. ⁴.

⁵ *Homersham v. Wolverh. Waterw. Co.*, 6 Ex. R. 137. This case is probably not law. See ante, p. 840, n. ⁴.

⁶ *Diggle v. Lond. & Blackwall Ry. Co.*, 6 Ex. R. 442. See, also, as to this case, ante, p. 840, n. ⁴.

⁷ *Paine v. Strand Union*, 8 Q. B. 326.

⁸ *Lamprell v. Billericay Union*, 3 Ex. R. 283.

⁹ *Austin v. Guard. of Bethnal Green*, 9 Law Rep., C. P. 91; 43 L. J., C. P. 100, S. C.

¹⁰ *Church v. Imp. Gas Light & Coke Co.*, 6 A. & E. 860—862, per Ld. (3711)

East India Company ceased to be merchants, it was held, that the allowance by them of a retiring pension to a military officer, could not be enforced in a court of law, unless it were granted by deed.¹

§ 981. It has long since been determined that corporations § 899 may be liable in *tort*² for the acts of their servants, though such servants be not authorised by any instrument under seal;³ and the rule requiring corporations to act by deed will not protect them, either from an action of trover, where goods have been wrongly taken by their agent,⁴ or from an action for money had and received, where they have wrongfully possessed themselves of money belonging to the plaintiff.⁵ This last exception rests on necessity; for, as a corporation would scarcely put their seal to a promise to return moneys wrongfully received by them, it follows that if a seal were necessary, the injured party would be without remedy. Again an action for use and occupation is clearly maintainable *by* a corporation,⁶ and is probably maintainable *against*

Denman, explaining *E. Lond. Waterw. Co. v. Bailey*, 4 Bing. 283; 12 Moore, 532, S. C. See, also, *Paine v. Strand Union*, 8 Q. B. 326; *Ernest v. Nicholls*, 6 H. of L. Cas. 401; *Lond. Dock Co. v. Sinnott*, 8 E. & B. 347; 27 L. J., Q. B. 129, S. C.; *Prince of Wales Life Ass. Co. v. Harding*, 27 L. J., Q. B. 297; E. B. & E. 183, S. C.

¹ *Gibson v. E. India Co.*, 5 Bing. N. C. 262; 7 Scott, 74, S. C. See *Cope v. Thames Haven Dock & Ry. Co.*, 3 Ex. R. 841.

² In *Kelly v. Mid. G. W. R. Co.*, 1 R., 7 C. L. 8, Whiteside, C. J., expressed a grave doubt whether an action for malicious prosecution could be maintained against a corporation aggregate. See, however, *Bank of New South Wales v. Owston*, L. R., 4 App. Cas. 270; 14 Cox, 267; & 48 L. J., Pr. C. 25, S. C.; and *Edwards v. Midl. Ry. Co.*, L. R., 6 Q. B. D. 287, per Fry, J.; 50 L. J., Q. B. 281, S. C.

³ *East. Cos. Ry. Co. v. Broom*, 6 Ex. R. 314; 6 Rail. Cas. 743, S. C.; *Whitfield v. S. East. Ry. Co.*, 27 L. J., Q. B. 229; E. B. & E. 115, S. C. This was an action for a libel transmitted by telegraph from one station to another on the defendants' line of rails. See, also, *Green v. Lond. Gen. Omnibus Co.*, 29 L. J., C. P. 13; 7 Com. B., N. S. 290, S. C.; *Roe v. Birkenhead, Lanc. & Chesh. Junc. Ry. Co.*, 7 Ex. R. 36; 6 Rail. Cas. 795, S. C.; *Goff v. Gt. North. Ry. Co.*, 30 L. J., Q. B. 148; 3 E. & E. 672, S. C.; *Moore v. Metrop. Ry. Co.*, 8 Law Rep., Q. B. 36; *Poulton v. Lond. & S. West. Ry. Co.*, 2 Law Rep., Q. B. 534; 36 L. J., Q. B. 294; & 8 B. & S. 616, S. C.; *Stewart v. Anglo-Califor. Gold Mining Co.*, 18 Q. B. 736; *Stevens v. Midl. Ry. Co. & Lander*, 23 L. J., Ex. 328; 10 Ex. R. 352, S. C.

⁴ *Yarborough v. Bank of Engl.*, 16 East, 6.

⁵ *Hall v. May. of Swansea*, 5 Q. B. 526.

⁶ *May. of Stafford v. Till*, 4 Bing. 77; 12 Moore, 260, S. C.; *Dean & Ch.*

a corporation,¹ whenever the defendants have *actually* occupied the plaintiff's premises, and no demise under seal has been executed; but this doctrine seems to rest on the peculiar language and object of the statute enabling landlords to bring such a form of action,² and it certainly does not extend to cases of mere constructive holding.³

§ 982. In the application of the above rule, and its exceptions, § 900 the question has often been discussed, as to how far a distinction can be recognised between *executed* and *executory* contracts,⁴ and the decisions on this subject are confessedly irreconcilable. No doubt, where the contract falls within one of the exceptions, and, consequently, need not be under seal, the corporation may equally sue or be sued upon the parol agreement, whether it be executed, or be merely executory;⁵ but the question is, what says the law, where a parol contract, which should have been under seal, has been *executed* by the one side before action brought, so that the other has received the whole benefit of the consideration for which it bargained?⁶ For example, can a corporate body, after having actually received goods ordered by its servants, refuse to pay for them on the technical pretext that no contract under seal has been executed? The Court of Queen's Bench,—apparently shocked at the gross injustice that might be perpetrated were such a system of repudiation allowable, and peradventure, bearing in mind the sage apophthegm of a great judge of the last century, that corporations, having neither bodies to be kicked nor souls to be damned, are not wont to be over nice observers of either honour or honesty,—has,

of *Rochester v. Pierce*, 1 Camp. 466; *Southwark Bridge Co. v. Sills*, 2 C. & P. 371; *May. of Carmarthen v. Lewis*, 6 C. & P. 608. See *Doe v. Bold*, 11 Q. B. 127.

¹ *Finlay v. Bristol & Ex. Ry. Co.*, 7 Ex. R. 409; 7 Rail. Cas. 449, S. C.; *Lowe v. Lond. & N. West. Ry. Co.*, 7 Rail. Cas. 524; 18 Q. B. 632, S. C. See ante, § 974.

² 11 G. 2, c. 19, § 14.

³ *Finlay v. Bristol & Ex. Ry. Co.*, 7 Ex. R. 409; 7 Rail. Cas. 449, S. C.

⁴ See ante, § 974, and post, §§ 1036, 1043.

⁵ *Church v. Imp. Gas Light & Coke Co.*, 6 A. & E. 846; 3 N. & P. 35, S. C.; recognised in *Gibson v. East India Co.*, 5 Bing. N. C. 271, and in *Arnold v. May. of Poole*, 4 M. & Gr. 895.

⁶ See *Eccles. Commiss. v. Merril*, 4 Law Rep., Ex. 162; 38 L. J., Ex. 93 S. C.

in accordance with morality, if not with law, decided this question in the negative on several occasions.

§ 983. Thus, where an action was brought against the guardians of an union for the price of some gates which had been erected at the poor-house under a parol order, and it was objected for the defence that the order was not by deed, the court overruled the objection, on the ground that it did not lie in the mouths of the defendants to take it, inasmuch as the work in question, after it was completed, had been adopted by them for purposes connected with the corporation.¹ On another occasion, Lord Denman, in a considered judgment, expressed himself as follows:—"To enforce an *executory* contract against a corporation, it might be necessary to show that it was by deed; but where the corporation have acted as upon an *executed* contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule that, in general, a corporation can only contract by deed; it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise; and we are not aware of any decision or authority against this view of the case."² § 901

§ 984. Decisions and authorities, however, may be found, which are wholly inconsistent with the law as thus propounded; for it has more than once been held by the Barons of the Exchequer, that a corporation is not precluded from relying on the absence of a seal, when works have been *executed* under a parol contract, even though such works have received the approval of the cor- § 902

¹ *Sanders v. St. Neot's Union*, 8 Q. B. 810. See, also, *Clarke v. Cuckfield Union*, 1 Bail Ct. Cas. 81; *Beverley v. Lincoln Gas Light & Coke Co.*, 6 A. & E. 829; *De Grave v. May. of Monmouth*, 4 C. & P. 111, per Ld. Tenterden; *Pauling v. Lond. & N. West. Ry. Co.*, 23 L. J., Ex. 105; 8 Ex. R. 867, S. C.

² *Doe v. Taniere*, 12 Q. B. 1013, 1014. See, also, *Henderson v. Austral. Roy. Mail St. Nav. Co.*, 5 E. & B. 409; *Austral. Roy. Mail St. Nav. Co. v. Marzetti*, 11 Ex. R. 228; *Reuter v. Elect. Teleg. Co.*, 6 E. & B. 341.

poration, which enjoyed the full benefit of them.¹ The judges of the Common Pleas, too, seem to have adopted the same rule; for where a solicitor, who had been appointed, but not under seal, by the mayor and town council of a borough to conduct suits, brought an action against the corporation for his costs, they held that he could not recover.²

§ 985. In order to authorise an *agent* to execute a deed for his principal, the authority must be given by an instrument under seal;³ and as such an instrument, or power of attorney, *transfers* no interest, the agent or attorney being merely put thereby in the place of the principal, it follows that the deed must be executed by the agent in the name and as the act of him who gave the power.⁴ Neither can a parol ratification, not amounting to a re-delivery,⁵ by the principal in a deed executed by his agent give validity to the deed, when the agent has not been authorised to act by an instrument under seal;⁶ though it seems that evidence of an express, if not of an implied, recognition or adoption of the deed by the principal, will, as against him, raise a presumption that the agent was thus formally authorised to act, so as to dispense with the necessity of proving that fact.⁷ § 907

§ 986. Proceeding now to a consideration of the documentary evidence which is rendered necessary by *statute law*, the first Act which arrests attention is the Companies Clauses Consolidation Act, 1845.⁸ This Statute enacts, in § 14, that, subject to the § 908

¹ *Lamprell v. Billericay Union*, 3 Ex. 307. See, also, *Diggles v. Lond. & Blackwall Ry. Co.*, 5 Ex. R. 442; *Homersham v. Wolverh. Waterw. Co.*, 6 Ex. R. 137; 6 Rail. Cas. 790, S. C.; *May. of Ludlow v. Charlton*, 6 M. & W. 815.

² *Arnold v. May. of Poole*, 4 M. & Gr. 860. See, also, *Clemenshaw v. Corp. of Dublin*, 1 R., 10 C. L. 1.

³ *Berkeley v. Hardy*, 5 B. & C. 355; 8 D. & R. 102, S. C.; *White v. Cuyler*, 6 T. R. 176; *Steiglitz v. Egginton*, Holt, N. P. R. 141; *Williams v. Walsby*, 4 Esp. 220; *Callaghan v. Pepper*, 2 Ir. Eq. R. 399.

⁴ *Hunter v. Parker*, 7 M. & W. 343, per Parke, B.; *M'Ardle v. Irish Iodine Co.*, 15 Ir. Law R., N. S. 146.

⁵ *Tupper v. Foulkes*, 30 L. J., C. P. 214; 9 Com. B., N. S. 797, S. C.

⁶ *Hunter v. Parker*, 7 M. & W. 343, per Parke, B.

⁷ *Tupper v. Foulkes*, 30 L. J., C. P. 214; 9 Com. B., N. S. 797, S. C. But see *Ld. Gosford v. Robb*, 8 Ir. Law R. 217.

⁸ 8 & 9 V., c. 16.

regulations therein and in the special Act contained, every shareholder in any company, to which the provisions of the general Act apply, may sell and transfer his shares in the undertaking, or his interest in the capital stock of the company; but every such *transfer* shall be by *deed* duly stamped, in which the consideration shall be duly stated; and such deed may be according to the form stated below,¹ or to the like effect. It is remarkable,—as illustrating the absence of uniformity in our efforts at legislation,—that the transfer of shares, whether under the old Joint-Stock Companies Act, 1856, now repealed,² or under the Companies Act, 1862,³ is not required to be by deed.

§ 987. Section 97 of the Companies Clauses Consolidation Act, § 903 1845,⁴ is also remarkable, as it rejects the common law rule which requires corporations to contract by deed, and expressly enacts, with respect to such companies as are subject to that statute, that “the powers which may be granted to any committee [of directors] to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows;—that is to say, With respect to any contract, which, if made between private persons, would be by law required to be in writing and under seal, such committee, or the directors, may make such contracts on behalf of the company in writing and under the common seal of the company, and in the same manner may vary or discharge the same: With respect to any contract, which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee, or the directors, may make such contract on

¹ “I—, of—, in consideration of the sum of—, paid to me by—, of—, do hereby transfer to the said—,—share [or shares] numbered—in the undertaking called ‘The—Company,’ [or —pounds consolidated stock in the undertaking called ‘The—Company,’ standing (or part of the stock standing) in my name in the books of the Company], to hold unto the said—, his executors, administrators, and assigns [or successors and assigns], subject to the several conditions on which I held the same at the time of the execution hereof; and I the said— hereby agree to take the said share [or shares] [or stock], subject to the same conditions. As witness our hands and seals the— day of —.”

² 19 & 20 V., c. 47, § 20, & Sch. (F); Repealed by 25 & 26 V., c. 89, § 205.

³ 25 & 26 V., c. 89, 1st Sch. Table A, No. 9.

⁴ 8 & 9 V., c. 16.

behalf of the company in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same: With respect to any contract, which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, such committee, or the directors, may make such contract on behalf of the company by parol only without writing, and in the same manner may vary or discharge the same. And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought, had the same contracts been made between private persons only."

§ 988. Under this section it has been held, that the fact of § 904 sleepers having been furnished to a railway company, and actually received and used by them, in pursuance of a contract made with an agent of the company upon certain terms, afforded reasonable evidence whence a jury might infer that the directors had agreed on behalf of the company to accept the goods on those terms.¹

§ 989. The contracts also of such joint-stock companies as are § 905 registered under the "Companies Acts, 1862, and 1867,"² are

¹ *Pauling v. Lond. & N. West. Ry. Co.*, 8 Ex. R. 867.

² 25 & 26 V., c. 89, and 30 & 31 V., c. 131, § 37, which last section (adopting the language of the repealed Act, 19 & 20 V., c. 47, § 41), enacts, that "contracts on behalf of any company registered under the Act of 25 & 26 V., c. 89, may be made as follows; (that is to say),

"(1.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged:

"(2.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged:

"(3.) Any contract which if made between private persons would by law be

not subject to the common law rule just discussed, but may be made in nearly the same manner as contracts under the Companies Clauses Consolidation Act. A special law, too, prevails with respect to the making, accepting, or indorsing of promissory notes or bills of exchange on account of such companies,¹ and also with respect to the execution abroad of deeds made on their behalf.² The memoranda of association, by which joint-stock companies are now incorporated, and the articles of association, by which the affairs of such companies may be regulated, are not required to be executed under seal; but after registration they become, by virtue of the Companies Act, 1862, as binding as deeds on every shareholder, who has signed them in the presence of a single attesting witness.³

§ 990. Under the "Public Health Act, 1875," all contracts § 906
 "whereof the value or amount exceeds 50*l.*," which shall be made by an urban sanitary authority, *must* be in writing, and be sealed with the common seal of such authority.⁴ The "Public Health, Ireland, Act, 1878," contains a similar clause.⁵

§ 991. The statute law relating to some large classes of debentures is in an unsatisfactory state, for while all such instruments issued under the Mortgage Debenture Acts of 1865 and 1870 must

valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged:

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be." See *Eley v. The Positive Governm. & Co.*, 45 L. J., Ex. 58; Law Rep., 1 Ex. D. 20, S. C.

¹ 25 & 26 V., c. 89, § 47. See *Peruvian Ry. Co. v. Thames & Mersey Mar. Ins. Co.*, 2 Law Rep., Ch. Ap. 617.

² *Id.* § 55; 27 & 28 V., c. 19.

³ 25 & 26 V., c. 89, §§ 11, 16.

⁴ 38 & 39 V., c. 55, § 174, subs. 1. See *Hunt v. Wimbledon Local Bd.*, L. R., 3 C. P. D. 208; 47 L. J., C. P. 540, S. C.; L. R., 4 C. P. D. 48, S. C., on App., and 48 L. J., C. P. 207; *Eaton v. Basker*, L. R., 6 Q. B. D. 201; 50 L. J., Ex. 194, S. C.; S. C. on App. 50 L. J., Q. B. 444; & L. R., 7 Q. B. D. 529; *Young v. Leamington, Corp. of*, L. R., 8 Q. B. D. 579; 51 L. J., Q. B. 292, S. C.; affd. by Dom. Proc., L. R., 8 App. Cas. 517; 52 L. J., Q. B. D. 713, S. C.; *Att.-Gen. v. Gaskill*, 52 L. J., Ch. 163; L. R., 22 Ch. D. 537, S. C.

⁵ 41 & 42 V., c. 52, § 201, subs. 1, Ir.

be deeds,¹ debentures, stock certificates to bearers, or annuity certificates issued in pursuance of "The Local Loans Act, 1875," may, as it seems, be valid, if duly signed, without the impression of any seal.² Under this last Act, debentures, stock certificates, and annuity certificates, when respectively payable to bearer, are transferable by delivery;³ while what are called "nominal securities" must be transferred "by *writing* in manner directed by the local authority."⁴ Irrespective of the statute law, debentures under the seal of a corporation will not, as it seems, be regarded as promissory notes, or even as negotiable instruments, though they may be drawn in express terms as payable to bearer.⁵

§ 992. Debts and other choses in action may now, by virtue of the Judicature Act, 1873, be absolutely assigned "by writing under the hand of the assignor;"⁶ and if express notice in writing be given to the debtor, trustee, or other person liable, such assignment will, from the date of the notice, transfer the legal right to the assignee.⁷

§ 993. Again, the assignment of a copyright of a book, under the Act of 5 & 6 V., c. 45, is not valid unless it be in writing;⁸ and the same law would probably apply to the assignment of any patent, or of any copyright in a registered design or trade-mark.⁹

§ 994. The next transaction which requires notice is the *sale* of a British *ship*, or of any share therein. The Act which regulates these sales is the Merchant Shipping Act of 1854,¹⁰ which in § 55 enacts,¹¹ that "a registered ship or a share therein, when dis-

§ 999.

¹ 28 & 29 V., c. 78; 33 & 34 V., c. 20, § 15.

² 38 & 39 V., c. 83, § 22.

³ *Id.* §§ 5, 6, 7.

⁴ *Id.* §§ 5, 6, 7.

⁵ *Crouch v. Crédit Foncier of Engl.*, 8 Law Rep., Q. B. 374; 42 L. J., Q. B. 183, S. C.

⁶ As to what will amount to an assignment of a debt, see *Buck v. Robson*, L. R., 3 Q. B. D. 686; 48 L. J., Q. B. 250, S. C.; and to the assignment of a chose in action, see *Brice v. Bannister*, 47 L. J., Q. B. 722; L. R., 3 Q. B. D. 569, S. C., per Ct. of App.; *Ex p. Hall*, re Whitting, L. R., 10 Ch. D. 615; 48 L. J., Bk. 79, S. C., per Ct. of App.; *Walker v. Bradford Old Bk.*, 53 L. J., Q. B. 280.

⁷ 36 & 37 V., c. 66, § 25, subs. 6; 40 & 41 V., c. 57, § 28, subs. 6, *Ir. See Burlinson v. Hall*, 53 L. J., Q. B. 222.

⁸ *Layland v. Stewart*, 46 L. J., Ch. 103; S. C. nom. *Leyland v. Stewart*, L. R., 4 Ch. D. 419; *Jewitt v. Eckhardt*, L. R., 8 Ch. D. 404, per Jessel, M. R.

⁹ See 46 & 47 V., c. 57, § 87, and cases cited in last note.

¹⁰ 17 & 18 V., c. 104.

¹¹ This enactment applies only to British ships, *Union Bk. of London v. Lenandon*, L. R., 3 C. P. D. 243; 47 L. J., Ex. (App.) 409, S. C.

posed of to persons qualified to be owners of *British* ships, shall be transferred¹ by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the Form marked E. in the Schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferrer in the presence of, and be attested by, one or more witnesses.”² This enactment,—unlike that contained in the repealed Act of 8 & 9 V., c. 89,³—applies as well to an executory contract for the sale, as to the absolute sale, of a ship.⁴ The present law, moreover, differs in several other material respects from that which was formerly in force. In the first place it appears to render an actual bill of sale necessary, though under the old law any instrument in writing, which recited the certificate of registry, was sufficient.⁵ Next, the bill of sale must now be executed by the transferrer himself, except under very special circumstances, when he is allowed to appoint an attorney by deed;⁶ but formerly a ship might have been transferred by an agent acting under a parol authority.⁷ Lastly, it is at least doubtful whether, since the 1st of May, 1855,⁸ any description of vessel used in navigation, not propelled by oars,⁹ can be sold without a bill of sale, though boats under fifteen tons burthen might, prior to that date, have been transferred by parol,¹⁰ and though such vessels do not now require to be registered, if solely employed in river or coast navigation.¹¹

¹ As to how a ship may be *mortgaged*, and the effect of an unregistered mortgage of a ship, see *Keith v. Burrows*, L. R., 1 C. P. D. 722; 45 L. J., C. P. 876, S. C.

² The bill of sale does not require a stamp, 33 & 34 V., c. 97, Sched. ad fin. tit. “General Exemptions.”

³ § 34. See *Duncan v. Tindal*, 13 Com. B. 258; *Hughes v. Morris*, 21 L. J., Ch. 761; 2 De Gex, M. & G. 349, S. C.; *McCalmont v. Rankin*, 2 De Gex, M. & G. 403.

⁴ *Bathyan v. Bouch*, 50 L. J., Q. B. 421; where the Ct. declined to follow *Liverpool Borough Bk. v. Turner*, 1 Johns. & Hem. 159; 2 De Gex, F. & J. 502, S. C. See *Chapman v. Callis*, 9 Com. B., N. S., 769; *Stapleton v. Haymen*, 34 L. J., Ex. 170; 2 H. & C. 918, S. C.

⁵ *Hunter v. Parker*, 7 M. & W. 343, 344, per Parke, B.

⁶ See 17 & 18 V., c. 104, § 76, et seq., and Form N. in Sch. to Act.

⁷ *Hunter v. Parker*, 7 M. & W. 322.

⁸ When the Merchant Shipping Act of 1854 came into operation.

⁹ See § 2 of 17 & 18 V., c. 104, tit. Ship; and § 55.

¹⁰ *Benyon v. Cresswell*, 12 Q. B. 899.

¹¹ § 19 of 17 & 18 V., c. 104.

§ 995. Under "The Policies of Marine Assurance Act, 1868," an assignment of a policy of insurance, even after a loss by the perils insured against,¹ may be made by indorsement on the policy,² and the assignee of such policy may sue thereon in his own name;³ but oddly enough the statute, while furnishing a short form of indorsement,⁴ leaves it uncertain whether it must be sealed as well as signed. § 909A

§ 996. The Act to simplify the transfer of property⁵ deserves a passing notice; for although that statute was extremely short-lived, it having been repealed within a year from its passing,⁶ it has rendered a *deed* necessary in all cases of partitions, exchanges, assignments, or surrenders in writing of freehold or leasehold lands, or of leases in writing of freehold, copyhold, or leasehold lands,⁷ provided the transfer has been effected between the 1st of *January*⁸ and the 1st of *October*,⁹ 1845. § 910

§ 997. This Act was succeeded by 8 & 9 V., c. 106, which enacts in § 2, "that after the 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery;" or, in other words, shall pass by the delivery of the deed of conveyance, in the same manner as incorporeal hereditaments have heretofore passed. § 3 of this statute further enacts, "that a *feoffment*, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a *partition* and an *exchange* of any tenements or hereditaments not being copyhold,—and a *lease*, required by law to be in writing,¹⁰ of any tenements or hereditaments,—and an *assignment of a chattel interest*, not being copyhold, in any tenements or hereditaments,—and a *surrender* in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have § 911

¹ Lloyd v. Fleming, W. N. of 1872, p. 6, per Q. B.

² 31 & 32 V., c. 86, § 2.

³ Id. § 1.

⁴ Id. Sched. The form ends with the words, "In witness whereof, &c."

⁵ 7 & 8 V., c. 76.

⁶ By 8 & 9 V., c. 106.

⁷ 7 & 8 V., c. 76, §§ 3 & 4; Burton v. Reeve, 16 M. & W. 307; Doe v. Mofatt, 15 Q. B. 257.

⁸ 7 & 8 V., c. 76, § 13.

⁹ 8 & 9 V., c. 106, § 1.

¹⁰ See post, § 1001.

been created without writing,—made after the 1st of October, 1845, shall also be *void* at law, unless made by *deed*: Provided always, that the said enactment, so far as the same relates to a release¹ or a surrender, shall not extend to Ireland.”

§ 998. This last enactment, so far as it relates to feoffments, § 912 partitions, exchanges, assignments, and surrenders, is of little practical importance, since, before the passing of the Act, such transfers were almost invariable effected by deed. With respect, however, to *leases* the statute has proved highly beneficial;² for by requiring all demises for a period exceeding three years³ to be under seal, it has gradually diminished, and at last dried up, that fruitful source of litigation, which used to spring from the difficulty of distinguishing between an actual lease and an agreement for a lease under the old law. Now, if the instrument be not under seal, it operates only as an agreement for a lease;⁴ that is, either party may enforce its specific performance and turn it into a lease;⁵ but, in the event of this course not being pursued, the party taking possession of land under it is a mere tenant at will, liable to become, by the payment and acceptance of rent,⁶ a tenant from year to year, and thenceforth to be subject to all those stipulations in the agreement which are applicable to such a tenancy.⁷

¹ This is obviously a misprint for “lease;” but the blunder has been remedied by 23 & 24 V., c. 154, § 104, and Sch. B., Ir., which repeats, so far as Ireland is concerned, that part of § 3 of 8 & 9 V., c. 106, which relates to leases, assignments, and surrenders.

² The statute does not apply to agreements for letting tolls of turnpike roads under 3 G. 4, c. 126, §§ 55, 57; *Shepherd v. Hodsmen*, 18 Q. B. 316; recognised by Byles, J., in *Markham v. Standford*, 14 Com. B., N. S. 380.

³ A lease for eighteen months, with power to lessee, by giving a month's notice, to prolong the term to a further period of two years, is not within the meaning of the statute. *Hand v. Hall*, L. R., 2 Ex. D. 355; and 46 L. J., Ex. 603, per Ct. of App., reversing S. C. as reported 46 L. J., Ex. 242, and L. R., 2 Ex. D. 318.

⁴ *Parker v. Taswell*, 2 De Gex & J. 559; 27 L. J., Ch. 812, S. C.; *Bond v. Rosling*, 1 B. & S. 371; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96, S. C.; *Tidey v. Mollett*, 16 Com. B., N. S. 298; 33 L. J., C. P. 235, S. C.; *Stranks v. St. John*, 36 L. J., C. P. 118; 2 Law Rep., C. P. 376, S. C.

⁵ *Parker v. Taswell*, 2 De Gex & J. 559; 27 L. J., Ch. 812, S. C. But see *Wood v. Beard*, L. R., 2 Ex. D. 30; 46 L. J., Ex. 100, S. C.

⁶ See, further, as to the operation of this Act, Davidson, Conc. Prec. of Convey. 50—71; Platt on Leases, passim. See, also, post, §§ 1001, 1002.

⁷ *Martin v. Smith*, 43 L. J., Ex. 42; 9 Law Rep., Ex. 50, S. C. See post, § 1001, ad fin.

§ 999. Although leases for any term exceeding three years are now void unless granted by deed, an equally formal instrument is not required for the purpose of confirming those leases, which are invalid by reason of some deviation from the terms of the power under which they were granted; for the Act of 13 & 14 V., c. 17, § 3, expressly enacts, that the *confirmation*, which shall suffice to establish the validity of any such defective lease, “may be by memorandum or note in writing signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised.” § 913

§ 1000. Bearing in mind the alterations effected by the Acts just mentioned, we come to the *Statute of Frauds*, passed in the reign of Charles II., the provisions of which Act have been extended to Ireland by 7 W. 3, c. 12, and have also been enacted, generally in the same words, in nearly all the United States.¹ This celebrated statute we owe to the great lawyer, but indifferent statesman, Lord Nottingham, who appears to have been assisted in framing it by Sir Leoline Jenkins and Lord Hale;² yet, notwithstanding these bright names, it is certainly drawn in so inartificial a manner as to confer little credit on the skill of the draftsmen; and if Lord Nottingham was justified, while speaking with parental pride of the principle of the measure, in declaring that it was an Act, every line of which was worth a subsidy,³—the present generation, who can contemplate the almost endless litigation which its ambiguous language has caused, may add with more truth, if not with more sincerity, that every line of it has cost a subsidy. The blame, however, which may justly be cast on the wording of the Act, must be converted into unqualified praise, if regard be had to the objects which it seeks to attain, and which it has, in fact, to a great extent attained.⁴ It will then be seen that⁵ the rules of evi- § 914

¹ 29 C. 2, c. 3; 4 Kent, Com. 95, and n. b. (4th ed.). The Civ. Code of Louis. art. 2415, without adopting in terms the provisions of the Stat. of Frauds, declares generally, that all verbal sales of immovable property shall be void. 4 Kent, Com. 450, n. a (4th ed.).

² 3 Campbell's Lives of the Chancellors, 418.

³ R. North's Life of Guildford, 209.

⁴ In *Doe v. Harris*, 8 A. & E. 12, Ld. Denman speaks of the Stat. of Frauds as “one of the wisest laws in principle, though far from being complete in its details, or fortunate in its execution.” ⁵ Gr. Ev. § 262, almost verbatim.

dence contained in this statute, are, for the most part, well calculated for the exclusion of perjury, by requiring, in the cases there mentioned, some more satisfactory evidence than mere oral testimony affords. The statute dispenses with no proof of consideration, which was previously required, and gives no efficacy to written contracts, which they did not previously possess.¹ Its policy is to impose such requisites upon private transfers of property, as, without being hindrances to fair transactions, may either be totally inconsistent with dishonest projects, or may tend to multiply the chances of detection.² The object of the present work will not admit of an extended consideration of the provisions of this statute; but will necessarily restrict us to a notice of the rules of evidence, which it has introduced.

§ 1001. By this statute, all *leases*, estates, and interests in lands, § 915 whether of freehold or for terms of years, and whether certain or uncertain, which, prior to the 1st of January, 1845,³ have been created by livery and seisin only,—that is, by mere matter in pais, without deed,⁴—or by parol, and not put in writing, and signed by the parties creating the same, or their agents duly authorised in writing, are allowed only the force and effect of estates at will; except leases not exceeding the term of three years from the making thereof, whereon the rent reserved shall amount to two-thirds of the improved value.⁵ It seems to be now determined, though the

¹ 2 St. Ev. 472; *Rann v. Hughes*, 7 T. R. 350, n.; *Barrell v. Trussell*, 4 Taunt. 121.

² Rob. on Frauds, Pref. xxii.

³ When 7 & 8 V., c. 76, came into operation. See ante, § 996.

⁴ See per Patteson, J., and Ld. Denman, in *Cooch v. Goodman*, 2 Q. B. 592, 597.

⁵ 29 C. 2, c. 3, § 1, enacts, that “all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.” § 2 “excepts, nevertheless, all leases not exceeding the term of three years from

point is not wholly free from doubt, that the above provisions of the statute are not applicable to *demises under seal*;¹ and, consequently, that an indenture of lease for more than three years need not be signed. It has been said more than once, that the tenancy described in the statute as "*an estate at will*," must be construed as a tenancy from year to year;² but this is not strictly accurate; since a party who enters under an agreement void by the statute, is, in point of law, tenant at will for the first year, though, like any other tenant at will, he will be converted into a tenant from year to year, as soon as a yearly rent has been paid and accepted.³ In both characters, too, he will be subject to such of the terms of the agreement, as are not inconsistent with the species of tenancy which the law under the circumstances creates;⁴ and, therefore, if one of the terms be that the tenant shall keep the premises in repair during his occupation,⁵ or that he shall paint in the seventh year of his tenancy,⁶ or that he shall pay his rent in advance,⁷ he will be liable

the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised." These provisions were enacted in § 1 of 7 W. 3, c. 12, Ir.; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V., c. 154, §§ 104, 105, and Sch. B. Ir. The law in Ireland is now regulated by § 4 of the Act just cited, which enacts, that "every lease or contract with respect to lands, whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time, not being from year to year or any lesser period, shall be by deed executed, or note in writing signed, by the landlord, or his agent thereunto lawfully authorised in writing." See *Bayley v. M. of Conyngham*, 15 Ir. Law R., N. S. 407; *Chute v. Busteed*, 14 id. 115.

¹ *Aveline v. Whisson*, 4 M. & Gr. 801; *Shep. Touch.* 56, n. 24; *Cooch v. Goodman*, 2 Q. B. 580, 597, 598; 2 G. & D. 159, S. C.; *Cherry v. Heming*, 4 Ex. R. 631. *Contrà*, 2 Bl. Com. 306.

² *Clayton v. Blakey*, 8 T. R. 3, per *Ld. Kenyon*; 2 Smith, L. C. 97, S. C.; *Berrey v. Lindley*, 3 M. & Gr. 512, per *Coltman, J.*; id. 514, per *Maule, J.*

³ *Richardson v. Gifford*, 1 A. & E. 56, per *Parke, J.*; 3 M. & Gr. 512, n. a, and cases there cited; 2 Smith, L. C. 94—96.

⁴ *Berrey v. Lindley*, 3 M. & Gr. 514, per *Maule J.*; *Doe v. Bell*, 5 T. R. 471; *Arden v. Sullivan*, 14 Q. B. 832. See *Tooker v. Smith*, 1 H. & N. 732.

⁵ *Richardson v. Gifford*, 1 A. & E. 50; 8 D. & R. 643, S. C. See *Beale v. Sanders*, 3 Bing. N. C. 850; 5 Scott, 58, S. C.; *Arden v. Sullivan*, 14 Q. B. 832.

⁶ *Martin v. Smith*, 43 L. J., Ex. 42; 9 Law Rep., Ex. 50 S. C.

⁷ *Lee v. Smith*, 9 Ex. R. 662.

to an action for a breach of any such term, notwithstanding the agreement is made void by the statute.

§ 1002. Although a parol lease for a longer period than the Act § 916 permits is inoperative as to its duration, still, if a tenant holds under it during the entire period, he may quit *without notice* at the expiration of the term. An example will illustrate this proposition. Suppose a parol lease of a house to have been granted for five years and a half, commencing at Michaelmas, 1880, at a specified annual rent. The tenant has entered, and till Mich., 1881, was a mere tenant at will. He then paid his rent, and continued in possession, and thereby became tenant from year to year until Mich., 1885, capable of quitting, or liable to be ejected, on giving or receiving a six months' notice to expire on the 29th of September in any year. At Lady-day, 1886, however, when the whole period of five years and a half will have run out, either party will be at liberty to terminate the tenancy without any notice whatever.¹ The term² of three years, for which a parol lease may be good, must be computed from the date of the agreement; and a term of three years to commence in futuro, will consequently not satisfy the statute.³ If a parol lease is made, to hold from year to year during the pleasure of the parties, this is adjudged to be a lease for only one year certain, and every subsequent year is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though, as to the time past, it is considered as one entire and valid lease for so many years as the tenant has enjoyed it.⁴

§ 1003.⁵ By the *third* section of the same statute,⁶ no leases, § 917

¹ Berrey v. Lindley, 3 M. & Gr. 498, 511, 513, 514; Doe v. Stratton, 4 Bing. 446; 1 M. & P. 183, S. C.; Doe v. Moffatt, 15 Q. B. 257; Tress v. Savage, 23 L. J., Q. B. 339; 4 E. & B. 36, S. C.

² Gr. Ev. § 263, in part.

³ Rawlins v. Turner, 1 Ld. Ray. 736.

⁴ Rob. on Frauds, 241—244.

⁵ Gr. Ev. § 264, in part.

⁶ 7 W. 3, c. 12, § 1, Ir., was to the like effect; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V., c. 154, §§ 104, 105, and Sch.

estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interests, in messuages, manors, lands, tenements, or hereditaments, could,—prior to the first of January, 1845,¹—be *assigned, granted, or surrendered*, unless by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or his agent authorized by writing, or by act and operation of law. At common law, surrenders of estates for life or years in possession in things corporeal were good, though made by parol; but things incorporeal, as advowsons, rents, and the like, and interests in lands not in possession, as remainders and reversions for life or years, lying *in grant*, could not, and still cannot, be surrendered except by deed.² The effect of this section is not to dispense with any evidence required by the common law; but to add to its provisions somewhat of security, by requiring a new and a more permanent species of evidence. Wherever, therefore, at common law a deed was necessary, the same solemnity is still requisite under this Act; but with respect to lands and tenements in possession, which, before the statute, might have been surrendered by words only, some note in writing, duly signed, was by the statute made essential to a valid surrender.³

§ 1004. In interpreting this section, it will be observed, that it § 918 does not contain,—like the first two sections of the Act,—any exception in favour of leases not exceeding the term of three years; and, consequently, it has been held to exclude alike parol assignments and parol surrenders of mere leases from year to year, though such

B. Ir. The law in Ireland is now regulated by §§ 7 & 9 of the Act just cited. § 7 enacts, that “the estate or interest of any tenement under any lease or other contract of tenancy shall not be *surrendered* otherwise than by a deed executed, or note in writing signed, by the tenant or his agent thereto lawfully authorised in writing, or by act and operation of law.” § 9 enacts, that “the estate or interest of any tenant in any lands under any lease or other contract of tenancy, shall be *assigned, granted, or transmitted* by deed executed, or instrument in writing signed, by the party assigning or granting the same, or his agent thereto lawfully authorised in writing, or by devise, bequest, or act and operation of law, and not otherwise.”

¹ When 7 & 8 V., c. 76, came into operation. See ante, §§ 996—998.

² Co. Lit. 337 b, 338 a; 2 Shep. Touch. 330; 1 Wms. Saund. 236 a; Lyon v. Reed, 13 M. & W. 303—305; ante, § 972.

³ Rob. on Frauds, 248.

leases have been created by verbal agreement.¹ It seems, also, that a parol agreement by a lessee for the transfer of his interest in a term not exceeding three years, which is intended to take effect as an *assignment*, and is invalid as such, cannot operate as an *underlease*.² If, however, both parties *intend* to create the relation of landlord and tenant, the mere fact of the parol demise passing all the lessor's interest in the premises will not prevent it from operating as a lease, at least for some purposes.³ The lessor, therefore, under these special circumstances, may maintain an action for use and occupation during the entire term, even should the lessee quit the premises before its expiration;⁴ and this, too, although the lessor, in consequence of having no reversion, cannot distrain for the rent in arrear.⁵

§ 1005. The *surrender by act and operation of law*, mentioned in the statute, is a phrase to which it is difficult to assign a precise meaning. Its most obvious application is, "to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is

§ 919

¹ *Botting v. Martin*, 1 Camp. 319, per M'Donald, C. B.; *Mollett v. Brayne*, 2 Camp. 103, per Ld. Ellenborough; *Thomson v. Wilson*, 2 Stark. R. 379, per id. See *Doe v. Wells*, 10 A. & E. 435—437.

² *Barrett v. Rolfe*, 14 M. & W. 348, questioning *Poultney v. Holmes*, 1 Str. 405.

³ *Pollock v. Stacy*, 9 Q. B. 1033, upholding *Poultney v. Holmes*, 1 Str. 405. But see *Beardman v. Wilson*, 4 Law Rep., C. P. 57; S. C. nom. *Beardmore v. Wilson*, 38 L. J., C. P. 91.

⁴ *Pollock v. Stacy*, 9 Q. B. 1033.

⁵ *Parmenter v. Webber*, 8 Taunt. 593; *Smith v. Mapleback*, 1 T. R. 441.

thereby estopped from disputing the seisin in fee of the remainderman; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if a tenant for years accepts from his lessor a grant of a rent, issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor."¹ In all these cases no question of *intention* can arise. The surrender is not the result of intention, but is the act of the law, and it takes place independent, and even in spite, of intention the most express.²

§ 1006. Neither is it material, whether the interest taken by the surrenderor under the new arrangement, be or be not equivalent to that which he enjoyed under the surrendered term; and, therefore, if a lessee for life, or for a long term of years, accepts from his landlord a new demise for a shorter period, this will amount to a surrender of his original lease.³ At one time it was thought that a tenancy under a lease would be surrendered by operation of law, if the parties were to make a verbal agreement, for a sufficient consideration, that, instead of the existing term, there should be a tenancy from year to year at a different rent, or even a tenancy at will.⁴ This doctrine, however, has been much shaken of late years, and the better opinion now is, that nothing short of an express demise will operate as a surrender of an existing lease.⁵ Still, it is not necessary that the new demise should in all events be incapable of being defeated. For example, if a lessee were to accept, *in accordance with his contract*, a second lease voidable upon condition, this, even in the event of its avoidance, would amount to a surrender of the former term; because such second lease would pass ab initio the actual interest contracted for, though that interest would be liable to be defeated at some future period.⁶

¹ *Lyon v. Reed*, 13 M. & W. 306, per Parke, B.

² *Id.* 306, 307, per *id.*

³ *Mellow v. May*, M. 636; recognised by Holroyd, J., in *Hamerton v. Stead*, 3 B. & C. 482, 483, and by Lefroy, B., in *Lynch v. Lynch*, 6 Ir. Law R. 142; 1 Wms. Saund. 236, c.

⁴ See cases cited in last note.

⁵ *Foquet v. Moor*, 7 Ex. R. 870; *Crowley v. Vitty*, *id.* 319.

⁶ *Roe v. Abp. of York*, 6 East, 102; *Doe v. Bridges*, 1 B. & Ad. 847, 856; (3729)

§ 1007. On the other hand, the acceptance of a *void* lease, which § 921 creates no new estate whatever,¹ or even the acceptance of a *voidable* lease, which, being afterwards made void *contrary to the intention* of the parties, does not pass an interest *according to the contract*, will not operate as a surrender of a former lease.² Nor will it make any difference in the consideration of this question, whether the surrender be express or implied; for as the Court of Queen's Bench justly observed on one occasion:³—"In the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void, in case the grant should be made void."

§ 1008. Again, the mere fact of a tenant entering into an agree- § 922 ment to *purchase* the estate will not work a surrender of his tenancy by operation of law; because such a contract contains an implied condition that the landlord should make out a good title; and it would be most unreasonable to suppose, that the tenant intended absolutely to surrender an existing term, while it was uncertain whether the purchase would be completed or not.⁴ If, however, from the peculiar wording of the agreement, it could fairly be inferred that the tenant, from its date, was to be absolutely a debtor for the purchase-money, paying interest upon it, and to cease to pay rent, a tenancy at will would probably be created after that time; and the acceptance of such new demise would then operate

Doe v. Poole, 11 Q. B. 716, 723; *Fulmerston v. Steward*, Plowd. 107 a, per Bromley, C. J.; Co. Lit. 45 a; *Lloyd v. Gregory*, Cro. Car. 501; *Whitley v. Gough*, Dyer, 140—146.

¹ *Roe v. Abp. of York*, 6 East, 86; explained by Abbott, C. J., in *Hamerton v. Stead*, 3 B. & C. 481, 482; *Lynch v. Lynch*, 6 Ir. Law R. 142, per Lefroy, B.; *Wilson v. Sewell*, 4 Burr. 1980; *Davison v. Stanley*, id. 2213, per Ld. Mansfield.

² *Doe v. Poole*, 11 Q. B. 713; *Doe v. Courtenay*, id. 702.

³ *Doe v. Courtenay*, 11 Q. B. 712; overruling *Doe v. Forwood*, 3 Q. B. 627.

⁴ *Doe v. Stanion*, 1 M. & W., 695, 701; *Tarte v. Darby*, 5 M. & W. 601.

as a surrender of the former interest.¹ An agreement between a landlord and tenant during the existence of a lease, that the former should lay out money on the premises, and the latter pay an additional rent in consequence, does not create a new tenancy at an increased rent, so as to amount to a surrender of the old lease by operation of law.²

§ 1009.³ The simple *cancellation* of a lease, even though both parties consent,⁴ cannot work a surrender by operation of law, to divest the tenant's estate, because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words only, as formerly used; and, therefore, a surrender by cancellation, which is but a sign, is also taken away; though a symbolical surrender may perhaps be still recognised in certain cases as the basis of equitable relief.⁵ It would seem that this rule equally applies, whether the cancelled deed relates to things lying in livery, or to those which lie only in grant.⁶ Neither will the fact of the deed being found cancelled in the possession of the lessor, furnish in itself any presumption of an actual surrender by deed or note in writing; though it may be a circumstance fit for the consideration of the jury, if coupled with proof that the lessee has been out of possession for a series of years, or that the lessor's papers have been destroyed, or that other occurrences have happened, which might account for, or excuse, the non-production of the written surrender.⁷

§ 1010. Though the doctrine of surrender by operation of law § 924

¹ 1 M. & W. 701.

² *Donellan v. Read*, 3 B. & Ad. 905; *Lambert v. Norris*, 2 M. & W. 335.

³ Gr. Ev. § 265, slightly.

⁴ *Ld. Ward v. Lumley*, 5 H. & N. 87; 29 L. J., Ex. 322, S. C.

⁵ *Magennis v. MacCullough*, Gilb. Eq. R. 236; *Roe v. Abp. of York*, 6 East, 86, 101; *Wootley v. Gregory*, 2 Y. & J. 536; *Bolton v. Bp. of Carlisle*, 2 H. Bl. 263, 264; *Doe v. Thomas*, 9 B. & C. 288; 4 M. & R. 218, S. C.; *Walker v. Richardson*, 2 M. & W. 882; *Natchbolt v. Porter*, 2 Vern. 112; 4 Kent, Com. 104; *Rob. on Frauds*, 251, 252; *id.* 248, 249; *Holbrook v. Tirrell*, 9 Pick. 105.

⁶ *Bolton v. Bp. of Carlisle*, 2 H. Bl. 263, 264; *Walker v. Richardson*, 2 M. & W. 892.

⁷ *Doe v. Thomas*, 9 B. & C. 288, 298—300; 4 M. & R. 218, S. C.; *Walker v. Richardson*, 2 M. & W. 882; *ante*, § 138.

was originally confined to cases where the tenant accepted from his lessor a new interest, inconsistent with that which he previously had, it has by modern decisions been considerably extended, and is now applied, not only to the case where the second lease is granted to the lessee himself, or to the lessee and his wife, or to the lessee and a stranger,¹ but to any act done by the landlord, which creates a new interest in a third party, inconsistent with the tenant's former interest; provided the tenant and third party concur in such act, and the former *actually gives up possession* in consequence of it.² Thus, a demise by the lessor to a stranger, with the assent of the lessee, if coupled with an actual change of possession, is a surrender by operation of law of the lessee's interest, at least, if it be merely a chattle interest.³ Whether the same doctrine would apply to a case where the former lessee had a freehold interest may admit of some doubt. In *Lynch v. Lynch*,⁴ the Irish Court of Exchequer held that it would, but that decision has been much shaken, if not overruled, by Lord St. Leonards, in the case of *Creagh v. Blood*.⁵ Although a parol licence to quit, even when followed by an actual quitting, will not of itself operate as a surrender of the tenant's interest;⁶ yet if the tenant, in pursuance of such a licence, gives up possession, and the landlord accepts it, the licence, coupled with the change of possession, will amount

¹ *Shep. Touch.* 301; *Hamerton v. Stead*, 3 B. & C. 478.

² *Thomas v. Cook*, 2 Stark. R. 408; 2 B. & A. 119, S. C.; *Stone v. Whiting*, 2 Stark. R. 235; *Dodd v. Acklom*, 6 M. & Gr. 672; *Lynch v. Lynch*, 6 Ir. Law R. 131; *Walker v. Richardson*, 2 M. & W. 882; *Davison v. Gent*, 26 L. J., Ex. 122; 1 H. & N. 744, S. C.; *Grimman v. Legge*, 8 B. & C. 324; 2 M. & R. 438, S. C.; *Bees v. Williams*, 2 C. M. & R. 581; *Graham v. Whichelo*, 1 C. & M. 188; *Reeve v. Bird*, 1 C. M. & R. 31; 4 Tyr. 612, S. C.; *Hall v. Burgess*, 5 B. & C. 332; *Nickells v. Atherstone*, 10 Q. B. 944; *McDonnell v. Pope*, 9 Hare, 705.

³ Cases cited in last note. In *Doe v. Wood*, 14 M. & W. 682, M., tenant from year to year to B., died, leaving his widow in possession. A., some time after, took out administration, but the widow continued in possession paying rent to B. within A.'s knowledge, and A. not objecting. Held, that these facts did not amount to a surrender on A.'s part, by operation of law, and, consequently, that A., on proof of M.'s tenancy and death, and his own title as administrator, could recover in ejectment against the widow.

⁴ 6 Ir. Law R. 131.

⁵ 3 Jones & Lat. 133, 161.

⁶ *Mollett v. Brayne*, 2 Camp. 103, per Ld. Ellenborough. See, also, *Doe v. Milward*, 3 M. & W. 328, and *Johnstone v. Hudlestone*, 4 B. & C. 922.

to a surrender by operation of law, and the landlord will not be able to recover any rent becoming due after his acceptance of the possession.¹

§ 1011. The extension of this doctrine of surrender, as explained § 925 in the early part of the preceding section, has been questioned by Lord Wensleydale, who has suggested that the cases on which it rests may be supported on the ground, that the occupation of the premises by the landlord's new tenants might "have the effect of eviction by the landlord himself, in superseding the rent or compensation for use and occupation during the continuance of that occupation."² Several of the cases may certainly be explained in this manner; and one was expressly decided on a somewhat similar ground;³ but in *Thomas v. Cook*,⁴ which is the leading authority on the subject, this point was neither suggested in argument, nor alluded to by the court; and in *Lynch v. Lynch*,⁵ which was much discussed in Ireland, the point could not have been taken at all, it being an action of ejectment brought by the former lessees for life, against the party who, with their consent, had been substituted in their place by the landlord. Moreover, the Court of Queen's Bench,⁶ and, more recently, the Court of Exchequer also,⁷ have declared their dissent from the line of argument advanced by Lord Wensleydale, and have confirmed the rule laid down in *Thomas v. Cook*.

§ 1012. On the whole it is submitted that this rule is good § 926 law; and that, confined, as it is, to cases where an actual, and consequently a notorious, shifting of possession has occurred, no real danger need be apprehended from its continuance. Its adop-

¹ *Grimman v. Legge*, 8 B. & C. 324; 2 M. & R. 438, S. C.; *Dodd v. Acklom*, 6 M. & Gr. 672; *Phené v. Popplewell*, 31 L. J., C. P. 235; 12 Com. B., N. S. 334, S. C.; *Whitehead v. Clifford*, 5 Taunt. 518. See *Cannan v. Hartley*, 19 L. J., C. P. 323; 9 Com. B. 634, S. C.; *Oastler v. Henderson*, 46 L. J., Q. B. 607, per Ct. of App.; L. R., 2 Q. B. D. 575, S. C.

² *Lyon v. Reed*, 13 M. & W. 309, 310.

³ *Gore v. Wright*, 8 A. & E. 118; 3 N. & P. 243, S. C.

⁴ 2 Stark. R. 408; 2 B. & A. 119, S. C.

⁵ 6 Ir. Law R. 131.

⁶ *Nickells v. Atherstone*, 10 Q. B. 944, 950, 951.

⁷ *Davison v. Gent*, 26 L. J., Ex. 122; 1 H. & N. 744, S. C.

tion, where reversions or incorporeal hereditaments, which pass only by deed, are disposed of, or its extension to cases where corporeal estates are dealt with by the consent of the tenant, but where no actual change of possession has taken place, would certainly let in all the dangers for avoiding which the statute was passed; and here Lord Wensleydale is quite right in observing, that if this were the law, it would very seriously affect titles to long terms of years; mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person.¹ However, as this is not the law at present,² nothing further need be said on the subject.

§ 1013. A surrender by operation of law may also be effected § 927 under the provisions of particular Acts of Parliament. For instance, the Bankruptcy Act, 1883, empowers the trustee of a bankrupt lessee to relieve himself from all responsibility under the lease, by simply disclaiming it in writing under his hand,³ provided he do so with the leave⁴ of the Court of Bankruptcy, within three months after his appointment, and within twenty-eight days after the lessor has applied to him to decide whether he will disclaim or not; and upon the execution of such disclaimer⁵ the lease is deemed to have been surrendered on the date of the disclaimer, and the lessor is deemed to be a creditor of the bankrupt to the extent of any injury he may have sustained by the operation of this enact-

¹ *Lyon v. Reed*, 13 M. & W. 309.

² *Id.* 310, as to estates lying in grant; *Doe v. Johnston*, M'Clel. & Y. 141, as to the assent of the tenant, when not coupled with change of possession; recognised in *Dodd v. Acklom*, 6 M. & Gr. 679, 682. In *Walker v. Richardson*, 2 M. & W. 882, there was a lease of tolls, but the point that this was a right which lay in grant was never taken.

³ A trustee who has taken possession of the leasehold property of the bankrupt, cannot divest himself of personal liability to the landlord for the rent, except in the mode indicated in the text. In *re Solomon*, ex p. Dressler, 48 L. J., Bk. 20, per Ct. of App. See, also, *Wilson v. Wallani*, L. R., 5 Ex. D. 155; 49 L. J., Ex. 437, S. C.; and *Lowrey v. Barker*, L. R., 5 Ex. D. 470, per Ct. of App.; 49 L. J., Ex. 433, S. C.

⁴ Leave to disclaim is not required in all cases. See "Bankruptcy Rules, 1883," R. 232.

⁵ But this disclaimer will not affect the rights of third parties; *Ex p. Walton*, re *Levy*, 50 L. J., Ch. 657, per Ct. of App. See, also, 46 & 47 V., c. 52, § 55, subs. 2.

ment, and he may prove the same as a debt under the bankruptcy.¹ The trustee of a bankrupt may, in like manner, get rid of any shares or stock in companies, unprofitable contracts, or unsaleable property, acquired by him under the Bankruptcy Act, and this, too, notwithstanding he may have taken possession of such property, or exercised any act of ownership over it.² Somewhat similar provisions will also be found in the "Irish Bankrupt and Insolvent Act, 1857,"³ and "the Bankruptcy, Ireland, Amendment Act, 1872."⁴ So, under the Building Societies Act, 1874, the society may indorse on any mortgage given to them by a member a receipt under their seal, and countersigned by the secretary or manager, and such receipt will have the effect of vacating the security, and of vesting the property comprised therein in the party entitled to the equity of redemption, without any reconveyance.⁵ "The Industrial and Provident Societies Act, 1876,"⁶ and "the Building Societies Act, 1875,"⁷ also contain like enactments.

§ 1014. It may here be noticed that the law no longer allows any *merger* by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.⁸

§ 1015. With respect to *assignments by operation of law*, these § 928 may be effected in a variety of ways. For instance, when a lessor owner in fee dies intestate, the reversion vests in his heir at law, and when a lessee dies intestate, the lease vests in his administrator, by operation of law. Nay, as against himself, even an executor de son tort may be treated as the assignee of a lease; and in all these cases, when an action is brought against the

¹ 46 & 47 V., c. 52, §§ 55, 56; In re Hide, per Lds. Js., 7 Law Rep., Ch. App., 28; 41 L. J., Bk. 5, S. C. A trustee, after disclaimer, cannot remove fixtures, In re Lavies, ex p. Stephens, 47 L. J., Bk. 22, per Ct. of App.; L. R., 7 Ch. D. 127, S. C. See In re Roberts, ex p. Brook, 48 L. J., Bk. 22, per Ct. of App.

² Id. §§ 55, 56.

³ 20 & 21 V., c. 60, §§ 271, 272, Ir.

⁴ 35 & 36 V., c. 58, §§ 97, 98, Ir.

⁵ 37 & 38 V., c. 42, § 42. Harvey v. Mun. Perm. Invest. Build. Soc., L. R., 26 Ch. D. 273.

⁶ 39 & 40 V., c. 45, § 12, subs. 8.

⁷ 38 & 39 V., c. 60, § 16, subs. 7.

⁸ 36 & 37 V., c. 66, § 25, subs. 4; 40 & 41 V., c. 57, § 28, subs. 4, Ir.

heir, or administrator, or executor de son tort, it will probably be sufficient to charge in the statement of claim that the reversion or lease respectively came to the defendant "by assignment thereof then made."¹ So, by virtue of the Conveyancing and Law of Property Act, 1881, an estate or interest of inheritance in any hereditaments will, on the death of the trustee or mortgagee, notwithstanding any testamentary disposition, vest, like a chattel real, in his legal personal representative.² So, the chattels real of any woman married before the 27th of August, 1870,³ or even between that date and the 1st of January, 1883,⁴ may be said, in the absence of a settlement, to have been assigned to her husband by operation of law;⁵ though women married since the latter date are entitled to hold as their separate estate all the real and personal property belonging to them at the time of marriage.⁶ When any person is adjudged a *bankrupt*, his property, whether real or personal, in or out of England, present or future, vested or contingent,⁷ becomes vested, without any deed of assignment or conveyance, in the trustee upon his appointment;⁸ and on the death, resignation, or removal of any such trustee, and the appointment of another in his stead, a similar vesting takes place.⁹ So, when the affairs of a debtor are being settled by composition, or scheme of arrangement, all his property vests in the trustee from the date of his appointment.¹⁰ So, where an official receiver is removed, dies, or resigns, all estates, rights, and powers, vested in

¹ *Paull v. Simpson*, 9 Q. B. 365; *Derisley v. Custance*, 4 T. R. 75.

² 44 & 45 V., c. 41, § 30.

³ When "The Married Women's Property Act, 1870," 33 & 34 V., c. 93, came into operation.

⁴ When "The Married Women's Property Act, 1882," 45 & 46 V., c. 75, came into operation.

⁵ See *Ashworth v. Outram*, L. R., 5 Ch. D. 923; 46 L. J., Ch. 687, per Ct. of App. S. C.

⁶ 45 & 46 V., c. 75, §§ 1, 2.

⁷ 46 & 47 V., c. 52, § 168. See *Stanton v. Collier*, 3 E. & B. 274; *Beckham v. Drake*, 2 H. of L. Cas. 579; *Rogers v. Spence*, 12 Cl. & Fin. 700; *Herbert v. Sayer*, 5 Q. B. 965; *Jackson v. Burnham*, 8 Ex. R. 173.

⁸ 46 & 47 V., c. 52, § 54. See, as to the Irish law, 20 & 21 V., c. 60, §§ 267, 268, Ir.

⁹ Id. § 54, subs. 3. See, as to the Irish law, 20 & 21 V., c. 60, §§ 267, 268, Ir.; 35 & 36 V., c. 58, § 121, r. 5, Ir.

¹⁰ Id. § 18, subs. 12. See, as to the Irish law, 35 & 36 V., c. 58, § 91, Ir.

him, shall, without any conveyance or transfer, vest in such official receiver as the Board of Trade may appoint.¹ So, under "the Friendly Societies Act, 1875," upon the death, resignation or removal of a trustee, the property vested in him vests in his successor without conveyance or assignment.² So, upon the appointment of an administrator of convict's property, all the estate of the convict therein becomes vested in such official,³ and remains so vested till the expiration of the sentence, when it reverts in the convict or his representative.⁴ It only remains to add, that a parol assignment by a sheriff of leasehold premises, taken in execution under a *fiery facias*, is void at law, though the assignee has entered and paid rent to the head landlord; and, consequently, the execution debtor may still regain possession of the premises in an action to recover land against the assignee,⁵ unless the latter pleads the facts by way of defence on equitable grounds, in which event he may possibly be enabled to defeat his opponent.

§ 1016.⁶ The Statute of Frauds further requires that the declaration or creation of *trusts* of land shall be manifested by some writing, signed by the party, "who is by law enabled to declare such trust;"⁷ and that all grants and assignments of any such trust shall also be in writing, signed in the same manner.⁸ The

¹ Bankruptcy Rules, 1883, R. 235, subs. 2.

² 38 & 39 V., c. 60, § 16, subs. 4.

³ 33 & 34 V., c. 23, § 10.

⁴ § 18.

⁵ *Doe v. Jones*, 9 M. & W. 372; 1 Dowl. N. S. 352, S. C.

⁶ Gr. Ev. § 266, in part.

⁷ These words refer to the *beneficial*, and not to the mere *legal*, owner of the estate. *Tierney v. Wood*, 19 Beav. 330; *Kronheim v. Johnson*, L. R., 7 Ch. D. 60, per Fry, J.; 47 L. J., Ch. 132, S. C.

⁸ 29 C. 2, c. 3, § 7, enacts, that "all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

§ 8 provides, that "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

§ 9 enacts, that "all grants and assignments of any trust or confidence

statute does not require that the trust itself should be created by writing; but only that it should be *manifested* by writing; plainly meaning that documentary evidence should be forthcoming, to prove first the existence, and next the nature of the trust.¹ A letter acknowledging the trust, and *a fortiori*, an admission in an answer in Chancery, has therefore been deemed sufficient to satisfy the statute.²

§ 1017.³ *Resulting trusts*, or those which arise by implication of law, are specially excepted from the operation of the Act.⁴ Trusts of this sort arise in three cases. First, where the estate is purchased in the name of one person, but the purchase-money is paid by another;⁵—and here, it matters not whether the legal estate be freehold, copyhold, or leasehold; whether it be taken in the names of the purchaser and others jointly, or in the names of others, without that of the purchaser; or in one name, or in several, jointly, or successive; but in all cases the trust will result to the man who advances the purchase-money,⁶ unless such a resulting trust would break in upon the policy of some statute,⁷ or unless the purchase be effected by a father,⁸ or perhaps a mother,⁹ in the name of an unprovisioned child, legitimate or illegitimate,¹⁰ or in the joint names

shall likewise be in writing, signed by the party granting the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.” See the corresponding Irish Act of 7 W. 3, c. 12, §§ 10, 11, 12.

¹ *Smith v. Matthews*, 30 L. J., Ch. 445, per Lds. Js. See *Booth v. Turle*, 16 Law Rep., Eq. 182; *Dye v. Dye*, 53 L. J., Q. B. 442, per Ct. of App.

² *Forster v. Hale*, 3 Ves. 696, 707, per Ld. Alvanley; *Randall v. Morgan*, 12 Ves. 67; *Rob. on Frauds*, 95; 3 Sug. V. & P. 252; 4 Kent, Com. 305.

³ Gr. Ev. § 266, in part.

⁴ See n. ⁸, in last page.

⁵ *Lloyd v. Spillet*, 2 Atk. 150, per Ld. Hardwicke.

⁶ *Dyer v. Dyer*, Watk. Copyh. 216, per Eyre, C. B.; 3 Sug. V. & P. 255, 256; *Wray v. Steele*, 2 Ves. & B. 388; *Baxter v. Brown*, 7 M. & Gr. 215.

⁷ *Ex parte Houghton*, 17 Ves. 251; *Redington v. Redington*, 3 Ridg. P. C. 106.

⁸ The doctrine probably extends to a purchase by any person who stands in loco parentis. *Powys v. Mansfield*, 3 Myl. & Cr. 359, per Ld. Cottenham.

⁹ But, in the case of a mother, the equitable presumption must be supported by some evidence of intention, *Bennet v. Bennet*, L. R., 10 Ch. D. 474, per Jessel, M. R., commenting on *Sayre v. Hughes*, 5 Law Rep., Eq. 376; 37 L. J., Ch. 401, S. C., per Stuart, V.-C.; and *In re De Visme*, 2 De Gex, J. & S. 17; 33 L. J., Ch. 332, S. C.

¹⁰ *Beckford v. Beckford*, Lofft, 490; 3 Sug. V. & P. 262. See *Soar v.* (3738)

of the purchaser and such child,¹ or of such child and another person.² In the case of the purchase by a parent, the trust, in the absence of clear evidence to the contrary,³—and the parent's subsequent declarations cannot furnish such evidence,⁴—will not be deemed a resulting trust for the purchaser, but a gift or advancement for the child;⁵ because parents are bound in conscience to provide for their children.⁶ Resulting trusts will arise, secondly, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and thirdly, in cases of fraud.⁷ Other divisions have been suggested;⁸ but they all seem reducible to these three heads.

§ 1018. In all these cases it appears now to be generally conceded, that parol evidence,—though received with great caution, and not deemed sufficient unless of a clear character,⁹—is admissible to establish the collateral facts (not contradictory to the deed, unless in the case of fraud), from which a trust may legally result;¹⁰ and that it makes no difference as to its admissibility whether the nominal purchaser be living or dead.¹¹ It has, indeed, been doubted whether parol evidence is admissible against the answer of the trustee denying the trust;¹² but no good reason can be given for en-

§ 930A

Foster, 4 Kay & J. 152; Tucker v. Burrow, 34 L. J., Ch. 478, per Wood, V.-C.; 2 Hem. & M. 515, S. C.

¹ Fox v. Fox, 15 Ir. Eq. R., N. S. 89; Sidmouth v. Sidmouth, 2 Beav. 447.

² Lamplugh v. Lamplugh, 1 P. Wms. 112.

³ Stock v. M'Avoy, 15 Law Rep., Eq. 55, per Wickens, V.-C., 42 L. J., Ch. 230, S. C.

⁴ O'Brien v. Sheil, I. R., 7 Eq. 255.

⁵ See Forrester v. Forrester, 34 L. J., Ch. 428, per Stuart, V.-C.; Hepworth v. Hepworth, 11 Law Rep., Eq. 10; 40 L. J., Ch. 111, S. C.

⁶ 3 Sug. V. & P. 262. See Devoy v. Devoy, 2 Sm. & Giff. 403; Jeans v. Cooke, 24 Beav. 513; Dumper v. Dumper, 3 Giff. 583; Williams v. Williams, 32 Beav. 370.

⁷ Lloyd v. Spillet, 2. Atk. 150, per Ld. Hardwicke.

⁸ 1 Lomax, Dig. 200.

⁹ Wilkins v. Stephens, 1 Y. & C., Ch. C. 431; Groves v. Groves, 3 Y. & J. 170.

¹⁰ Marshal v. Crutwell, 20 Law Rep., Eq. 328, per Jessel, M. R.; 44 L. J., Ch. 504, S. C.

¹¹ 3 Sug. V. & P. 257—260; 2 Story, Eq. Jur. § 1201, n.; Lench v. Lench, 10 Ves. 517; 3 Law Mag. 131—139; 4 Kent, Com. 305; Boyd v. M'Lean, 1 Johns., Ch. R. 582; Pritchard v. Brown, 4 New Hamps. 307; Goodwin v. Hubbard, 15 Mass. 218, n. by Mr. Rand.

¹² 3 Sug. V. & P. 256, 257.

tertaining such a doubt.¹ As a resulting trust may be established by parol evidence, it may also, notwithstanding the statute, be rebutted by the same species of proof; and, therefore, parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially.² Nay, if the circumstances be such as to render it probable that a gift was really intended, the presumption of a resulting trust may be effectually rebutted even by the sole testimony of the party interested in supporting the gift.³

§ 1019. § 4 of the same statute,⁴—which, like § 1, as before § 931 stated,⁵ would seem to be inapplicable to deeds,⁶—enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the *agreement*, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.⁷

§ 1020. § 17⁸ also enacts, that no contract for the sale of goods, § 932 wares, or merchandise, for the *price of ten pounds* or upwards,

¹ 3 Law Mag. 136—138; *Bartlett v. Pickersgill*, 4 East, 577, n., per Henley, L. K.

² 3 Sug. V. & P. 260; *Edwards v. Edwards*, 2 Y. & C., Ex. R. 123; *Brady v. Cubitt*, 1 Doug. 31, 39; *Beecher v. Major*, 2 Drew. & Sm. 431; *Goodright v. Hodges*, Watk. Copyh. 227; 2 East, 534, n.

³ *Fowkes v. Pascoe*, 44 L. J., Ch. 367, per Lds. Js.; 10 Law Rep., Ch. Ap. 343, S. C.

⁴ 29 C. 2, c. 3; § 7 of 7 W. 3, c. 12, Ir., corresponds with this sect.

⁵ Ante, § 1001.

⁶ *Cherry v. Heming*, 4 Ex. R. 631.

⁷ As to the meaning of these last words, see *Norris v. Cooke*, 30 Law Times, 224, in Ir. Ex.; *Smith v. Webster*, 45 L. J., Ch. 528, per Ct. of App., overruling S. C. id. 430; L. R., 3 Ch. D. 49, S. C.

⁸ § 21 of 7 W. 3, c. 12, Ir., corresponds with this sect.

shall be good, unless the buyer shall except part of the goods, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or unless "some note or memorandum in writing of the said *bargain* be made and signed by the parties¹ to be charged by such contract, or their agents² thereunto lawfully authorised." This last enactment is extended by Lord Tenterden's Act,³ "to all contracts for the sale of goods of the *value of ten pounds* and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

§ 1021. Though the language of § 4, relating to sales of lands, § 933 varies in some trifling respects from that used in § 17 respecting sales of goods, the meaning is substantially the same in both sections;⁴ and in order to satisfy either, the *consideration* for the *agreement* in the one case, and for the *bargain*⁵ in the other, must, —except in the case of a special promise made by one person to answer for the debt, default, or miscarriage of another,⁶—appear expressly or impliedly in writing signed by the party to be charged, or by his agent. This rule applies, not only to bargains for the sale of

¹ A. signed a contract to buy a ship of B. B. altered the contract, signed it and returned it to A., who thereupon assented by parol to the alteration, but did not re-sign the document. Held, that the statute was satisfied. *Steward v. Eddowes*, 43 L. J., C. P. 204; 9 Law Rep., C. P. 311, S. C. Sed qu.

² One party to a contract cannot sign the name of the other as his agent, so as to bind him within the statute; *Sharman v. Brandt*, 6 Law Rep., Q. B. 720, per Ex. Ch.; 40 L. J., Q. B. 312, S. C. Neither, in the absence of express authority, can the vendor's traveller sign the bargain in purchaser's name as his agent. *Murphy v. Boese*, 44 L. J., Ex. 40; 10 Law Rep., Ex. 126, S. C. See post, § 1109.

³ 9 G. 4, c. 14, § 7. This Act also extends the similar enactment contained in § 21 of 7 W. 3, c. 12, Ir.

⁴ *Kenworthy v. Schofield*, 2 B. & C. 947, per Bayley, J.

⁵ *Egerton v. Mathews*, 6 East, 307, may appear at variance with this rule, but the bargain there, like all bargains for the purchase of goods, imported consideration on the face of it. See per Park, J., in *Jenkins v. Reynolds*, 3 B. & B. 21; and *Hunt v. Adams*, 5 Mass. 360, 361.

⁶ 19 & 20 V., c. 97, § 3, cited post, § 1030.

goods, to agreements upon consideration of marriage,¹ to contracts for the sale or lease of lands, and to agreements not to be performed within a year;² but also to special promises made by executors or administrators to answer damages out of their own estate. The judges have established this doctrine with the view of effectuating the object of the statute; but those who have watched its operation cannot fail to have observed, that, instead of preventing, it has increased to a great extent, the commission of fraud. Many of the States of America,³ influenced by these considerations, have repudiated the rule as highly impolitic; and hopes may reasonably be entertained that, ere long, the Legislature of this country will adopt similar views.

§ 1022. At present, however, the rule prevails in full force both in England and in Ireland, the only recognised qualification of it being that the consideration need not be stated on the face of the written memorandum in express terms; but that it will suffice if it can be collected, not indeed by mere conjecture however plausible,⁴ but by fair and reasonable, if not necessary, intendment from the whole tenor of the writing.⁵ § 934

¹ See *Saunders v. Cramer*, 3 Dru. & War. 87.

² *Lees v. Whitcomb*, 5 Bing. 34; 2 M. & P. 86, S. C.; *Sykes v. Dixon*, 9 A. & E. 693; 1 P. & D. 463, S. C.; *Sweet v. Lee*, 3 M. & Gr. 466.

³ For example, the rule was rejected in Massachusetts,* by the whole court, upon great consideration, in *Packard v. Richardson*, 17 Mass. 122, and this decision has been upheld by the Legislature of that State; the revised stat. c. 74, § 2, providing, that the consideration of the promise, contract, or agreement, need not be set forth in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence. So the rule is rejected in Maine, *Levy v. Merrill*, 4 Greenl. 180; in Connecticut, *Sage v. Wilcox*, 6 Conn. 81; in New Jersey, *Buckley v. Beardsley*, 2 South. 570; in North Carolina, *Miller v. Irvine*, 1 Dever. & B. 103; and in South Carolina, *Fyler v. Givens*, *Riley*, Law Cas. 56, 62; see, also, *Violet v. Patton*, 6 Cranch, 142; *Taylor v. Ross*, 3 Yerg. 330; 3 Kent, Com. 122.

⁴ *Hawes v. Armstrong*, 1 Bing. N. C. 765, 766, per Tindal, C. J.; *James v. Williams*, 5 B. & Ad. 1109, per Patteson, J.; *Raikes v. Todd*, 8 A. & E. 855, 856, per Ld. Denman.

⁵ *Joint v. Mortyn*, 2 Fox & Sm. 4; *Saunders v. Cramer*, 3 Dru. & War. 87; *Price v. Richardson*, 15 M. & W. 540; *Caballero v. Slater*, 14 Com. B. 300.

* Gr. Ev. § 268, n.
(3742)

§ 1023. Before leaving the subject of the consideration for a promise, it may be observed generally, that whether it be express or implied, it must move from the plaintiff, and be such as he has the means of performing or causing to be performed; and moreover, it must not be contaminated with any illegal, fraudulent, or immoral transaction, or contravene any rule of the common or statute law; but, subject to these restrictions, any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment, or disadvantage sustained by the plaintiff, however small may be the benefit on the one hand, or the inconvenience on the other, is a sufficient consideration, if such act be performed, or such inconvenience be suffered, by the plaintiff, with the consent, express or implied, of the defendant, or in the language of pleading, at his special instance and request.¹ § 935

§ 1024. It is further essential to the validity of the written document, that all the material terms of the contract,² and the promise,³ should be stated therein, either directly or by reference.⁴ For example, an agreement for a lease must contain all the essential terms of the lease; and therefore, if the court cannot discover from it at what date the tenancy is to commence, the document will be rejected as not satisfying the requirements of the statute.⁵ Still any memorandum will suffice, which, employing mere general language, without condescending to minute particulars, contains all that leads to future certainty. For instance, if a man undertakes in writing to purchase a particular article at a named price, this will satisfy the statute, though it be agreed at the same time that the article in question shall have some alteration or addition made to it before delivery.⁶ So, when an auctioneer had signed a memorandum, § 936

¹ Selw. N. H. 43 et seq.; 2 Wms. Saund. 137g—137k, and cases there collected.

² *Archer v. Baynes*, 5 Ex. R. 625; *Wood v. Midgley*, 5 De Gex, M. & G. 41; *Holmes v. Mitchell*, 28 L. J., C. P. 301; 7 Com. B., N. S. 361, S. C.

³ *Carroll v. Cowell*, 1 Jebb & Sy. 43; *Morgan v. Sykes*, cited in argument in *Coats v. Chaplin*, 3 Q. B. 486.

⁴ "I admit that an agreement is not perfect, unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, the subject matter of the contract, the consideration, and the promise," per Tindal, C. J., in *Laythoarp v. Bryant*, 2 Bing. N. C. 742.

⁵ *Marshall v. Berridge*, 51 L. J., Ch. 329.

⁶ *Sarl v. Bourdillon*, 26 L. J., C. P. 78; 1 Com. B., N. S. 188, S. C.

acknowledging the receipt from A. B. of 21*l.* as deposit on *property* belonging to C. D., purchased at 420*l.* on a certain day at a named place, this was held to be a sufficient description of a house that had been sold by auction, parol evidence being admissible to identify the particular premises.¹ Again, if a party agrees to pay rent for a certain farm at a specified sum per acre,² or, in consideration of forbearance, to pay for all goods supplied to a third party during the antecedent month, or even to liquidate his *debt*, the written memorandum need not specify the number of the acres, the quantity of the goods, or the amount of the debt; because each of these facts is capable of being ascertained with certainty by subsequent inquiry.³ If it be contended, that in the last instance given the memorandum is insufficient, as two or more debts may be owing from a third party, and it does not appear to which of these the writing applies, the answer is clear;—namely, that the court will not presume the existence of more debts than one, but will call upon the party impeaching the document to furnish proof of that fact, and, consequently, in the absence of such proof, the maxim, *de non apparentibus et de non existentibus eadem est ratio*, will be held to apply.⁴ Again, the omission of the particular mode⁵ or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale;⁶ and a written order for goods “on moderate terms” will satisfy the statute,⁷ though, if a specific price be agreed upon, it must be mentioned in the contract.⁸ Where the memorandum of a contract was void under the Statute of Frauds for omitting all reference to the price, the court allowed the plaintiff to rely on part performance of the contract, and then to

¹ *Shardlow v. Cotterill*, 51 L. J., Ch. 353, per Ct. of App.; L. R., 20 Ch. D. 90, S. C.

² *Shannon v. Bradstreet*, 1 Sch. & Lef. 73, per Ld. Redesdale.

³ *Bateman v. Phillips*, 15 East, 272; *Shortrede v. Cheek*, 1 A. & E. 58, 60; *Bleakley v. Smith*, 11 Sim. 150. See post, § 1030.

⁴ *Shelton v. Braithwaite*, 7 M. & W. 437, 438; *Shortrede v. Cheek*, 1 A. & E. 57; *Dobell v. Hutchinson*, 3 A. & E. 371; *Powell v. Dillon*, 2 Ball & B. 420; *Spickernell v. Hotham*, 1 Kay, 669.

⁵ *Sarl v. Bourdillon*, 26 L. J., C. P. 78; 1 Com. B., N. S. 188, S. C.

⁶ *Valpy v. Gibson*, 4 Com. B. 864, per Wilde, C. J.

⁷ *Ashcroft v. Morrin*, 4 M. & Gr. 450.

⁸ *Elmore v. Kingscote*, 5 B. & C. 583; 8 D. & R. 343, S. C.; *Goodman v. Griffiths*, 1 H. & N. 574.

establish by parol evidence the price on which the parties had verbally agreed.¹

§ 1025. The names of both contracting parties must also be specified, either nominally, or by description, or by reference, in the memorandum,² though on this point the courts show little inclination to enforce any strict rule. For instance, in two sales of land by auction, where the particulars stated that the property was put up for sale "by direction of the proprietor," the requirements of the 4th section of the Act were held to be satisfied, so far as the description of the vendor was concerned;³ and the same point has been ruled on two other occasions, in one of which the vendor was simply described as "the executor of Admiral F.,"⁴ and in the other as "a trustee selling under a trust for sale."⁵ In a fifth case, however, the late Master of the Rolls was constrained to decide that the mere term "vendor" was not of itself a sufficient description of one of the contracting parties.⁶ In a case, which turned on the 17th section of the Act, where the defendant, having purchased various articles in the plaintiff's shop, signed his name and address in the "Order-book," at the head of an entry which specified the articles and the prices, the statute was held to be satisfied, as the plaintiff's name was printed on the fly leaf of the book, and the defendant might have seen it had he looked for it.⁷

¹ *Jeffcott v. North Brit. Oil Co.*, 1 R., 8 C. L. 17.

² *Champion v. Plummer*, 1 N. R. 252; *Vandenbergh v. Spooner*, 1 Law Rep., Ex. 316; 35 L. J., Ex. 201; and 4 H. & C. 519, S. C.; *Williams v. Byrnes*, 2 New R. 47, per Pr. C.; 1 Moo. P. C., N. S. 154, S. C.; *Warner v. Willington*, 3 Drew. 523; *Wheeler v. Collier*, M. & M. 125, per Ld. Tenterden; *Skelton v. Cole*, 4 De Gex & J. 587; *Williams v. Lake*, 29 L. J., Q. B. 1; 2 E. & E. 349, S. C.; *Newell v. Radford*, 37 L. J., C. P. 1; 3 Law Rep., C. P. 52, S. C.; *Boyce v. Green*, Batty, R. 608; *Williams v. Jordan*, 46 L. J., Ch. 681, per Jessel, M. R.; L. R., 6 Ch. D. 517, S. C.

³ *Rossiter v. Miller*, 46 L. J., Ch. 228, per Jessel, M. R.; affirmed as to this point by Ct. of App., L. R., 5 Ch. D. 648, 657, 658; and 46 L. J., Ch. 737; and by Dom. Proc., L. R., 3 App. Cas. 1124, and 48 L. J., Ch. 10; *Sale v. Lambert*, 18 Law Rep., Eq. 1, per Jessel, M. R.; 43 L. J., Ch. 470, S. C. See, also, *Commings v. Scott*, 20 Law Rep., Eq. 11; 44 L. J., Ch. 563, S. C.

⁴ *Hood v. Ld. Barrington*, 6 Law Rep., Eq. 218.

⁵ *Catling v. King*, 46 L. J., Ch. 384, per Ct. of App.; L. R., 5 Ch. D. 660, S. C.

⁶ *Potter v. Duffield*, 18 Law Rep., Eq. 4; 43 L. J., Ch. 472, S. C. See *Thomas v. Brown*, L. R., 1 Q. B. D. 714; 45 L. J., Q. B. 811, S. C.

⁷ *Sarl v. Bourdillon*, 26 L. J., C. P. 78; 1 Com. B., N. S. 188.

§ 1026.¹ The written evidence required by this and similar § 937 statutes, need not be comprised in a single document, or be drawn up in any particular form; but it will suffice if the contract can be *plainly made out in all its terms from any writings* of the party,² or even from his *correspondence*.³ Nay, a signed letter will be sufficient, though it does not contain in itself any one of the terms of the agreement, if it distinctly refers to and recognises any writing which does contain them all:⁴ for, in such case the well-known maxim of law, "*verba illata inesse videntur*," will be held to apply.⁵ A written memorandum, however, which in any material point differs from the terms of the verbal contract, or which either introduces any new term, or leaves any material term open to doubt,⁶ will not satisfy the requirements of the statute.⁷ Neither will a letter suffice, which, instead of ratifying, repudiates the written but unsigned contract relied on;⁸ though, if the letter itself enumerates all the essential terms of the bargain, it will be sufficient, notwithstanding it may also contain some reason for the non-acceptance of

¹ Gr. Ev. § 268, in part.

² See *Shardlow v. Cotterill*, 51 L. J., Ch. 353, per Ct. of App.; 20 L. R., Ch. D. 90, S. C.; affirming on this point, 50 L. J., Ch. 613; L. R., Ch. D. 280, S. C., per Kay, J.

³ *Allen v. Bennet*, 3 Taunt. 169; *Jackson v. Lowe*, 1 Bing. 9; *Phillimore v. Barry*, 1 Camp. 513, per Ld. Ellenborough; *Warner v. Willington*, 25 L. J., Ch. 662; 3 Drew. 523, S. C.; *Skelton v. Cole*, 4 De Gex & J. 587.

⁴ *Dobell v. Hutchinson*, 3 A. & E. 355, 371; 5 N. & M. 251, 260, S. C.; *Jones v. Victoria Graving Dock Co.*, 46 L. J., Q. B. 219; L. R., 2 Q. B. D. 314, S. C.; *Gibson v. Holland*, 35 L. J., C. P. 5; 1 H. & R. 1, S. C.; and 1 Law Rep., C. P. 1; *Macrory v. Scott*, 5 Ex. R. 907; *Ridgway v. Wharton*, 3 De Gex, M. & G. 677; 6 H. of L. Cas. 238, S. C.; 1 Sug. V. & P. 171; *Baumann v. James*, 3 Law Rep., Ch. App. 508; *Long v. Millar*, 48 L. J., Q. B. 596, per Ct. of App.; L. R. 4 C. P. D. 450, S. C.; *Cave v. Hastings*, L. R., 7 Q. B. D. 125; 50 L. J., Q. B. 575, S. C.; *Crane v. Powell*, 38 L. J., M. C. 43; 4 Law Rep., C. P. 123, S. C. See post, § 1061. See, also, *Stanley v. Dowdeswell*, 10 Law Rep. C. P. 102, where the court was unusually astute in suggesting reasons why an answer to a letter should not be regarded as a sufficient acceptance of an offer.

⁵ See per Parke, B., in *Llewellyn v. Ld. Jersey*, 11 M. & W. 189.

⁶ *Hussey v. Horne-Payne*, L. R., 4 App. Cas. 311, per Dom. Proc.; S. C., 48 L. J., Ch. 846; S. C., L. R., 8 Ch. D. 670, per Ct. of App.; 47 L. J., Ch. 751, S. C., nom. *Hussey v. Payne*. There a proposal to sell was accepted, "subject to the title being approved." Held no sufficient acceptance.

⁷ *Mahalen v. Dublin & Chap. Distil. Co.*, 11 C. L. 83.

⁸ *Archer v. Baynes*, 5 Ex. R. 625; *Richards v. Porter*, 6 B. & C. 437; *Cooper v. Smith*, 15 East, 103. See *Goodman v. Griffiths*, 1 H. & N. 574; *Jackson v. Oglander*, 2 Hem. & M. 465.

the goods, which form the subject-matter of the contract.¹ It is now settled law that a simple acceptance by letter of a written offer to purchase may constitute a contract to sell, although it refers to the preparation of a more formal contract; unless, indeed, the reference be expressed in such language as to indicate an intention not to be bound by the bargain until the formal instrument be duly executed.² Still, the entire contract must be collected from the *writings*;³ verbal testimony not being admissible to supply any defects or omissions in the written evidence.⁴ For the policy of the statute is to prevent fraud and perjury, by taking all the enumerated transactions out of the reach of any verbal testimony. But, though parol evidence cannot be received to alter the terms of the written contract, or to supply any omissions in it, such evidence may be admitted to show the situation of the parties at the time the contract was made,⁵ or to identify any plans or other documents or things referred to in the contract;⁶ as also to explain

¹ *Bailey v. Sweeting*, 30 L. J., C. P. 150; 9 Com. B., N. S. 843, S. C.; *Wilkinson v. Evans*, 35 L. J., C. P. 224; 1 Law Rep., C. P. 407; and 1 H. & R. 552, S. C.; *Buxton v. Rust*, 41 L. J., Ex. 1; 7 Law Rep., Ex. 1, S. C.; 7 Law Rep., Ex. 279, and 41 L. J., Ex. 173, S. C. in Ex. Ch.; *Leather Cloth Co. v. Hieronimus*, 10 Law Rep., Q. B. 140; 44 L. J., Q. B. 54, S. C. See *Mundy v. Asprey*, 49 L. J., Ch. 216, per Fry, J.; S. C., nom. *Munday v. Asprey*, L. R., 13 Ch. D. 855. See *Elliott v. Dean*, 1 Cab. & El. 283, per Smith, J.

² *Bonnewell v. Jenkins*, L. R., 8 Ch. D. 70, per Ct. of App.; 47 L. J., Ch. 758, S. C.; *Crossley v. Maycock*, 43 L. J., Ch. 379; S. C. 18 Law Rep., Eq. 180, per Jessel, M. R.; *Rossiter v. Miller*, L. R., 5 Ch. D. 648; 46 L. J., Ch. 737, S. C.; S. C. in Dom. Proc., L. R., 3 App. Cas. 1124; and 48 L. J., Ch. 10; *Brien v. Swainson*, 1 L. R., Ir. 135; *Lewis v. Brass*, L. R., 3 Q. B. D. 666, per Ct. of App.

³ See *Chinnock v. Lady Ely*, 4 De Gex, J. & S. 638, reversing the decision of the court below as reported in 2 Hem. & M. 220; *Winn v. Bull*, 47 L. J., Ch. 139, per Jessel, M. R.; L. R., 7 Ch. D. 29, S. C.; *Rishton v. Whatmore*, L. R., 8 Ch. D. 467, per Hall, V. C.; 47 L. J., Ch. 629, S. C.; *Dolling v. Evans*, 36 L. J., Ch. 474; *Nesham v. Selby*, 13 Law Rep., Eq. 191, per Ld. Romilly, M. R.; 7 Law Rep., Ch. Ap. 406; and 41 L. J., Ch. 551, per Lds. Js., S. C.; *Peirce v. Corf*, 9 Law Rep., Q. B. 210; 43 L. J., Q. B. 52, S. C.

⁴ *Boydell v. Drummond*, 11 East, 142; 2 Camp. 163, S. C.; *Cox v. Middleton*, 2 Drew. 209; *Ridgway v. Wharton*, 3 De Gex, M. & G. 677; *Caddick v. Skidmore*, 2 De Gex & J. 56, per Ld. Cranworth, Ch.; 27 L. J., Ch. 153, S. C.; *Fitzmaurice v. Bayley*, 8 E. & B. 664, in Ex. Ch.; S. C., in Dom. Proc., 9 H. of L. Cas. 78; *Clarke v. Fuller*, 16 Com. B., N. S. 24; 2 Kent. Com. 511; *Rob. on Frauds*, 121; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R. 280—282; *Abeel v. Radcliff*, 13 Johns. 297.

⁵ *Sweet v. Lee*, 3 M. & Gr. 466, per Tindal, C. J.

⁶ *Horsfall v. Hodges*, 2 Coop. 115, per Sir. J. Leach; *Cave v. Hastings*, L. R., 7 Q. B. D. 125; 50 L. J., Q. B. 275, S. C.

the language employed,¹ or, it seems, even to fix the date at which it was committed to writing.²

§ 1027. Again, it does not signify to whom the memorandum which states the terms of the agreement is addressed, because the memorandum is not necessary to *constitute* the contract, but merely to furnish satisfactory *proof* of it. A letter, therefore, addressed to a third party,³ or an answer to a bill in Chancery under the old forms of pleading, or an affidavit in any legal proceeding,⁴ or written and signed instructions given to a telegraph clerk for transmission,⁵ or the minutes of a board meeting, signed by the Chairman;⁶ will suffice, provided the documents sufficiently refer to the terms of the original verbal promise; and even, where the party to be charged had attested a deed which recited the oral agreement, this was held to be sufficient, as it appeared that in fact he knew of the recital.⁷ But a written memorandum, made after the action is brought, will not satisfy the statute.⁸ § 938

§ 1028. The *place of signature* is also immaterial, as the statute does not require that the writing should be *subscribed* by the party to be charged, but merely that it should be signed. If, therefore, a party inserts his name, either at the beginning, or in the body, of a document, for the purpose of authenticating or governing every part of it, this will be equally valid with a signature at the foot;⁹ § 939

¹ Sweet *v.* Lee, 3 M. & Gr. 452. See Waldron *v.* Jacob, I. R., 5 Eq. 131, where parol evidence was admitted to show what "this place" meant.

² Edmunds *v.* Downes, 2 C. & M. 459; Hartley *v.* Wharton, 11 A. & E. 934; 3 P. & D. 529, S. C.; Lobb *v.* Stanley, 5 Q. B. 574.

³ Longfellow *v.* Williams, Pea. Add. Cas. 225, per Lawrence, J.; Rose *v.* Cunynghame, 11 Ves. 550, per Ld. Hardwicke; 3 Atk. 503; 2 Ch. R. 147; 1 Vern. 110; 1 Smith, L. C. 272; Gibson *v.* Holland, 35 L. J., C. P. 5; 1 H. & R. 1, S. C.; and 1 Law Rep., C. P. 1.

⁴ Barkworth *v.* Young, 26 L. J., Ch. 153, 158, per Kindersley, V.-C.

⁵ Godwin *v.* Francis, 39 L. J., C. P. 121; 5 Law Rep., C. P. 295, S. C.

⁶ Jones *v.* Victoria Graving Dock Co., 46 L. J., Q. B. 219; L. R., 2 Q. B. D. 314, S. C.

⁷ Welford *v.* Beezley, 1 Ves. Sen. 6; 1 Wils. 118, S. C.

⁸ Bill *v.* Bament, 9 M. & W. 36.

⁹ Caton *v.* Caton, 2 Law Rep., H. L. 127; 36 L. J., Ch. 886, in Dom. Proc., S. C.; Lobb *v.* Stanley, 5 Q. B. 574, 583; Johnson *v.* Dodgson, 2 M. & W. 659, per Ld. Abinger; Durrell *v.* Evans, 31 L. J., Ex. 337; 1 H. & C. 174, S. C.; Knight *v.* Crockford, 1 Esp. 190, 193, per Eyre, C. J.; Lemayne *v.*

though in these cases it will always be a question for the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it.¹ Where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both parties in the body of the instrument, but concluded "As witness our hands," and no signatures were subscribed, the court held that the statute was not satisfied, as it was obviously intended that the agreement should not be perfect till the names were added at the foot.²

§ 1029. With respect to the *mode of signature*, it matters not § 940 whether the Christian name be set out at length or denoted by the initial, or omitted altogether;³ but it seems that the surname must be written at length, and that if the letter be signed by the mere initials of the party,⁴ or if it be subscribed, without signature, "by your affectionate mother,"⁵ or the like, it will not suffice. A *printed* signature has been held sufficient where the party to be charged had written other parts of the memorandum, or had done other acts amounting to a recognition of his printed name.⁶ Perhaps even a telegram, sent in the usual way by the party to be charged, and containing his name, would satisfy the Act, on the sensible ground that justice must adapt itself to the altered habits of the day.⁷ Again, it is unnecessary that the agreement or memorandum should be signed *by both parties*; for the Statute of Frauds only requires that it should be signed "by the party to be charged therewith," that is, by the defendant, against whom the performance or damages are demanded.⁸ If it be said that, unless the plaintiff

Stanley, 3 Lev. 1; Ogilvie v. Foljambe, 3 Mer. 53; Saunderson v. Jackson, 2 B. & P. 238, per Ld. Eldon; Hammersley v. Baron de Biel, 12 Cl. & Fin. 63, per Ld. Cottenham; Holmes v. Mackrell, 3 Com. B., N. S. 789; Bleakley v. Smith, 11 Sim. 150. See post, § 1075.

¹ Johnson v. Dodgson, 2 M. & W. 659, per Ld. Abinger.

² Hubert v. Treherne, 3 M. & Gr. 743; 4 Scott, N. R. 486, S. C.

³ Lobb v. Stanley, 5 Q. B. 574, 581; Ogilvie v. Fojambe, 3 Mer. 53.

⁴ Hubert v. Moreau, 2 C. & P. 528; 12 Moore. 216, S. C.; Sweet v. Lee, 3 M. & Gr. 452, 460.

⁵ Selby v. Selby, 3 Mer. 2, per Sir W. Grant.

⁶ Schneider v. Norris, 2 M. & Sel. 286; Saunderson v. Jackson, 2 B. & P. 238; Turret v. Cripps, 48 L. J., 567, Ch.

⁷ Godwin v. Francis, 39 L. J., C. P. 121; 5 Law Rep., C. P. 295, S. C.

⁸ Laythorpe v. Bryant, 2 Bing. N. C. 735; 8 Scott, 238, S. C.; Liverpool (3749)

also signs, there is a want of mutuality, the answer is, that the defendant had it in his power to require the plaintiff's signature; and that, if he has not done so, it is his own fault. Even a written and signed proposal accepted by parol will be sufficient,² provided the offer be accepted in its entirety.³

§ 1030. Having made these general observations, which will be found to apply, not only to the Statute of Frauds, but to most, if not all, of the Acts that render documentary proof necessary, it will be convenient to notice briefly such of the transactions enumerated in §§ 4 and 17 of the Act of Charles the Second, as seem to require explanation. And first as to *guarantees*.⁴ The law with respect to these instruments has been materially altered by the Mercantile Law Amendment Act of 1856.⁵ Prior to the 29th of July in that year,⁶ a guarantee,—like other agreements, which the Statute of Frauds requires to be in writing,⁷—was deemed invalid, unless the consideration for the promise was set forth in the document, or at least could be implied from the language used. But that rule,—as was pointed out in the second edition of this work,⁸—caused such gross injustice to be perpetrated, especially in the County Courts, that the attention of Parliament was at length directed to the matter. A clause was consequently inserted in the

Borough Bk. *v.* Eccles, 4 H. & N. 139; Seton *v.* Slade, 7 Ves. 275, per Ld. Eldon; Egerton *v.* Mathews, 6 East, 307; Allen *v.* Bennet, 3 Taunt. 169. The last two cases were decisions on § 17, which uses the word *parties*. These cases overruled the dicta of Ld. Redesdale and Sir T. Plumer in *Lawrenson v. Butler*, 1 Sch. & Lef. 13; and *O'Rourke v. Purceval*, 2 Ball & B. 58. See 3 M. & Gr. 462, n., and 2 Kent, Com. 510. As to when a covenantee may sue for a breach of covenant, although he has not executed the deed, see *Wetherell v. Langston*, 1 Ex. R. 634; *Pitman v. Woodbury*, 3 Ex. R. 4; *Brit. Emp. Ass. Co. v. Browne*, 12 Com. B. 723; *Morgan v. Pike*, 14 Com. B. 473; *Swatman v. Ambler*, 8 Ex. R. 72.

¹ *Laythorp v. Bryant*, 2 Bing. N. C. 743, per Tindal, C. J.

² Per Cresswell, J., in *Ashcroft v. Morrin*, 4 M. & Gr. 451; *Watts v. Ainsworth*, 3 Fost. & Fin. 12; 1 H. & C. 83, S. C.; *Smith v. Neale*, 2 Com. B., N. S. 67, 88; *Peek v. N. Staffords. Ry. Co.*, 29 L. J., Q. B. 97, in Ex. Ch.; *Warner v. Willington*, 3 Drew. 532; *Reuss v. Picksley*, 1 Law Rep., Ex. 342; 35 L. J., Ex. 218, S. C., per Ex. Ch.; 4 H. & C. 588, S. C.

³ See *Forster v. Rowland*, 30 L. J., Ex. 396; 7 H. & N. 103, S. C.

⁴ Guarantees must now be in writing under the Scotch law. See 19 & 20 V., c. 60, § 6.

⁵ 19 & 20 V., c. 97.

⁶ When the Act passed. ⁷ Ante, § 1021.

⁸ § 933.

Act just cited,¹ which enacts, that “no special promise to be made by any person after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.” This provision, it must be admitted, is not very artistically drawn, and, among other defects, it is silent as to what consequences would result from the needless insertion in the memorandum of a *past* consideration, or of any other consideration which is insufficient in law. It remains, therefore, to be seen whether, in this event, the courts would admit parol evidence to vary the terms of the written document, and to show that the real consideration for the promise was other than that stated.² Moreover, it must be borne in mind, that, although parol evidence is rendered admissible by the statute for the purpose of supplying the consideration, it cannot be received now, any more than formerly, to explain the promise.³

§ 1031. In administering the law relating to guarantees, one of the main difficulties is to distinguish between *original* and *collateral* promises; that is, between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event of the other party making default.⁴ As this is a question of fact for the jury it is seldom possible to lay down any

¹ § 3 of the Act.

² See post, § 1197, ad fin.

³ *Holmes v. Mitchell*, 7 Com. B., N. S. 361.

⁴ *Birkmyr v. Darnell*, Salk. 27; 1 Smith, L. C. 262, S. C.; *Forth v. Stanton*, 1 Wms. Saund. 211 a—211 e; *Barrett v. Hyndman*, 3 Ir. Law R. 109; *Fitzgerald v. Dressler*, 29 L. J., C. P. 113; 7 Com. B., N. S. 374, S. C.; *Mallett v. Bateman*, 16 Com. B., N. S. 530; 33 L. J., C. P. 243, S. C.; 35 L. J., C. P. 40, in Ex. Ch.; 1 Law Rep., C. P. 163; and 1 H. & R. 109, S. C. See *Orrell v. Coppock*, 26 L. J., Ch. 269.

precise rule of construction, though the courts in this country, as well as those in America, have held that agreements by factors to sell upon *del credere* commission, do not fall within the fourth section of the Statute of Frauds, and, consequently, need not be in writing.¹ In general, however, cases of this kind must separately be determined on their own merits;² it being remembered that original promises will be valid, though verbally made,³ while collateral promises must be in writing, in order to satisfy the statute.⁴

§ 1032. As the promise must, in the words of the Act, be one "to answer for the debt, default, or miscarriage of another,"⁵ the liability of that other must continue notwithstanding the promise, or the defendant will not be allowed to rely on the absence of a written document.⁶ For instance, if a defendant, in consideration that the plaintiff will discharge out of custody his debtor taken on a *ca. sa.*, promises to pay the debt, this promise need not be in writing, it being regarded as an original one; because the moment the debtor is discharged, *his* liability is at an end, and the promise of the defendant cannot take effect till after the discharge.⁷ So, where a creditor had issued execution against a debtor, but subsequently it was arranged with the assent of all parties that the debtor should convey his property to a third party, who thereupon undertook, in consideration of the creditor relinquishing his execution, to pay the amount of the debt, it was held that this undertaking was not within the statute, as the effect of the arrangement

¹ *Couturier v. Hastie*, 8 Ex. R. 40; *Wickham v. Wickham*, 2 Kay & J. 478, per Wood, V.-C.; *Wolff v. Koppell*, 5 Hill, N. Y. R. 458.

² 1 Wms. Saund. 211 b; 1 Smith, L. C. 262.

³ Unless for the sale of goods for the price of 10*l.* or upwards. See ante, § 1020.

⁴ See *Mountstephen v. Lakeman*, 39 L. J., Q. B. 275; 5 Law Rep., Q. B. 613, S. C.; per Ex. Ch., 41 L. J., Q. B. 67; 7 Law Rep., Q. B. 196, S. C.; and per Dom. Proc., 7 Law Rep., H. L. 17; and 43 L. J., Q. B. 188, S. C., nom. *Lakeman v. Mountstephen*.

⁵ As to the meaning of these words, see *Macrory v. Scott*, 5 Ex. R. 907.

⁶ See *Gull v. Lindsay*, 4 Ex. R. 45, 52.

⁷ *Goodman v. Chase*, 1 B. & A. 297; *Butcher v. Steuart*, 11 M. & W. 857, 873; *Lane v. Burghart*, 1 Q. B. 933, 937, 938; 1 G. & D. 312, S. C. See *Reader v. Kingham*, 13 Com. B., N. S. 344.

was to discharge the original debtor.¹ So, where A. promised B. to pay him a certain sum in case he withdrew his record in an action against C. for assault and battery, this was held to be an original promise.²

§ 1033. On the other hand, where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid, the court held, that as the debtor's liability was kept alive by the warrant, the defendant's undertaking should be regarded in the light of a collateral guarantee, and as such, was a promise within the meaning of the statute.³ So, where it was agreed between a plaintiff, his attorney, and the defendant, that in consideration of the discontinuance of the suit, the defendant should pay the attorney the costs due from the plaintiff, this was considered a promise to pay the debt of another, as, in the event of its breach, the attorney might still recover his costs from the plaintiff who retained him.⁴ Even a promise to answer for the debt of another person, who himself never becomes legally indebted to the promisee, is possibly within the Act, if, at the time of the making of the promise, both parties intended that a contract of suretyship should be created.⁵ Moreover, it makes no difference whether the goods were delivered to the third party,⁶ or the debt incurred, or the default committed by him, *before* or *after* the promise by the defendant; for a promise to *indemnify*, if not within the words, is at least within the spirit, of the statute; and, consequently, where the language was, in effect, this:—"If you will become bail in a civil suit for A., and he for-

¹ Bird v. Gammon, 3 Bing. N. C. 883; 5 Scott, 213, S. C.

² Read v. Nash. 1 Wils. 305; recognised in 3 Bing. N. C. 889; but questioned in 1 Wms. Saund. 211 c, 211 d.

³ Lane v. Burghart, 3 M. & Gr. 597.

⁴ Tomlinson v. Gell, 6 A. & E. 564; 1 N. & P. 588, S. C.

⁵ Mountstephen v. Lakeman, 39 L. J., Q. B. 275; 5 Law Rep., Q. B. 613, S. C. Judgment reversed, but on another ground, 41 L. J., Q. B. 67; 7 Law Rep., Q. B. 196, S. C. See, however, Lakeman v. Mountstephen, 7 Law Rep., H. L. 24, and 43 L. J., Q. B. 193, per Ld. Selborne, who disputes the proposition in the text.

⁶ Matson v. Wharam, 2 T. R. 80; Anderson v. Hayman, 1 H. Bl. 120.

feits his bail bond, I will save you harmless," it was held to be answering for the default of another.¹ But where a man promised to indemnify another against all liability, if he would enter into recognizances for the appearance of a misdemeanant, this promise, as relating to a *criminal* proceeding, was held not to fall within the meaning of the Statute of Frauds.²

§ 1034. Again, the statute applies to promises to answer for the *tortious* default or miscarriage of another, as well as for his breach of *contract*; and, therefore, where A. had killed the plaintiff's horse by hard riding without his leave, a verbal promise by the defendant to pay the damage, in consideration of the plaintiff forbearing to sue A., was held to be void.³ Where an entire promise is invalid as to a part for not being in writing, no action can be brought on the remainder which is not within the statute, but the whole promise, being indivisible, will be void.⁴ A promise to pay the promisee's own debt to a third person need not be in writing, for the Act merely applies to promises made to the person to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person *towards the promisee*.⁵ § 944

§ 1035. With respect to "*agreements made in consideration of marriage*," the first-observation which occurs is, that these words do not embrace mutual promises to marry; and therefore, notwithstanding the Act, such promises may be verbally made, as indeed is usually the case.⁶ It may next be noticed, that although, as a general rule in equity the courts will enforce a contract, even § 945

¹ *Green v. Cresswell*, 10 A. & E. 453, 458; 2 P. & D. 430, S. C., overruling the dicta of Bayley and Parke, Js., in *Thomas v. Cook*, 8 B. & C. 728; 3 M. & R. 444, S. C.; and explaining *Adams v. Dansey*, 6 Bing. 506.

² *Cripps v. Hartnoll*, 4 B. & S. 414; 32 L. J., Q. B. 381, S. C.; per Ex. Ch., overruling S. C., 31 L. J., Q. B. 150; 2 B. & S. 697, S. C.

³ *Kirkham v. Marter*, 2 B. & A. 613.

⁴ *Lexington v. Clark*, 2 Vent. 223; *Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664, 671; *Mechelen v. Wallace*, 7 A. & E. 49.

⁵ *Eastwood v. Kenyon*, 11 A. & E. 438, 446; 3 P. & D. 276, S. C.; *Hargreaves v. Parsons*, 13 M. & W. 561, 570, per Parke, B.; *Thomas v. Cook*, 8 B. & C. 728, 3 M. & R. 444, S. C.; *Reader v. Kingham*, 13 Com. B., N. S. 344; *Wildes v. Dudlow*, 44 L. J., Ch. 341, per Malins, V.-C.

⁶ B. N. P. 280, c.

void by the statute, provided that it be a *complete* agreement,¹ and that there has been such a part performance on the side of the plaintiff, as that it would be a fraud on him if the defendant could object that the agreement was not in writing,²—yet it has been repeatedly held, that the marriage *per se* is not a part performance within this rule;³ and therefore, if a suitor verbally agrees to settle property on his intended wife, and the lady, relying on his honour, marries him, she cannot compel the performance of his agreement;⁴ neither can a suitor, after simply marrying his intended wife, enforce the specific performance of a parol agreement made by her father with reference to settlements.⁵ Perhaps, however, in the event of a clear case of fraud being established, the court, notwithstanding the Act, would compel the father to realise the expectations, on the faith of which the marriage was contracted;⁶ and little doubt can be entertained that, if the father were to say to the suitor, “Marry my daughter, and settle so much a year on her for her jointure, in which case I will give you so much for her portion,” this proposal, though not reduced to writing, would amount to a valid equitable contract, if the marriage were actually to take place, and the jointure were settled.⁷ It is, also, probably the law,—though two recent cases throw some doubt upon the subject,⁸—that

¹ Lady E. Thynne v. E. of Glengall, 2 H. of L. Cas. 131.

² Clinan v. Cooke, 1 Sch. & Lef. 41; Kine v. Balfe, 2 Ball & B. 347, 348; Surcome v. Pinniger, 3 De Gex, M. & G. 571; Taylor v. Beech, 1 Ves. Sen. 297; Ungley v. Ungley, L. R., 4 Ch. D. 73; 46 L. J., Ch. 189, S. C.; L. R., 5 Ch. D. 887, S. C., aff. on app.; and 46 L. J., Ch. 854.

³ Hammersley v. Baron de Biel, 12 Cl. & Fin. 64, per Ld. Cottenham; Redding v. Wilks, 3 Br. C. C. 401; Lassence v. Tierney, 1 M. & Gord. 571, 572, per Ld. Cottenham; 2 Hall & T. 115, 134, 135, S. C.; Warden v. Jones, 23 Beav. 487; aff. on app. 2 De Gex & J. 76, 84.

⁴ Montacute v. Maxwell, 1 P. Wms. 619; Caton v. Caton, 1 Law Rep., Ch. Ap. 137; 35 L. J., Ch. 292, S. C.; and 2 Law Rep., H. L. 127; 36 L. J., Ch. 866, in Dom. Proc., S. C.

⁵ Dundas v. Dutens, 1 Ves. 199; Goldieutt v. Townsend, 28 Beav. 445.

⁶ Baron de Biel v. Hammersley, 3 Beav. 469, 475, 476, per Ld. Langdale; 12 Cl. & Fin. 86, per Ld. Brougham, S. C.

⁷ Hammersley v. Baron de Biel, 12 Cl. & Fin. 45, 64, per Ld. Cottenham; 65 & 66, per Lds. Campbell & Lyndhurst; Williams v. Williams, 37 L. J., Ch. 854, per Stuart, V.-C. See, also, Maunsell v. White, 4 H. of L. Cas. 1039; Bold v. Hutchinson, 20 Beav. 250; 5 De Gex, M. & G. 558, S. C.; Jameson v. Stein, 21 Beav. 5. See Kay v. Crook, 3 Sm. & Giff. 407.

⁸ Warden v. Jones, 2 De Gex & J., 76, 85, per Ld. Cranworth, C.; Trowell v. Shenton, L. R., 8 Ch. D. 318, 324, 325, per Jessel, M. R.

a verbal agreement made before marriage will be enforced, if subsequently to the marriage it has been recognised and adopted in writing.¹ But the Court will not interfere, even though there be a written memorandum, unless it appears that the marriage was contracted on the faith of the agreement;² and, therefore, where a father wrote to his daughter, saying that he had agreed to give her intended husband 3000*l.* as her portion, and this letter was never shown to her husband, it was held not to be such an agreement in writing as satisfied the statute, since the husband could not have married on the faith of the letter.³

§ 1036. In interpreting what is meant by an *agreement that is not to be performed within a year* from the making thereof, the courts have held that the statute does not apply, where the contract is capable of being performed on the one side or on the other within a year.⁴ Neither does it extend to an agreement made by a contractor to allow a stranger to share in the profits of a contract, which is incapable of being completed within a year, because such an agreement amounts to nothing more than the vendition of a right which is performed instantaneously on the bargain being struck.⁵ It would seem also that the statute is inapplicable in any case where the action is brought upon an *executed* consideration;⁶ for as the object of the Legislature clearly was, to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise

¹ *Barkworth v. Young*, 26 L. J., Ch. 153, 157, per Kindersley, V.-C.; *Hammersley v. Baron de Biel*, 12 Cl. & Fin. 64, per Ld. Cottenham, citing *Hodgson v. Hutchenson*, 5 Vin. Abr. 522; *Taylor v. Beech*, 1 Ves. Sen. 297; and *Montacute v. Maxwell*, 1 Str. 236; and questioning *Randall v. Morgan*, 12 Ves. 73, where Sir W. Grant expressed serious doubt upon the subject. See 12 Cl. & Fin. 86, per Ld. Brougham; and 3 Beav. 475, 476, per Ld. Langdale. Also, *Caton v. Caton*, 1 Law Rep., Ch. App. 137; 35 L. J., Ch. 292, S. C., overruling S. C. as decided by Stuart, V.-C., 34 L. J., Ch. 564.

² See *Viret v. Viret*, 50 L. J., Ch. 69, per Malins, V.-C.

³ *Ayliffe v. Tracy*, 2 P. Wms. 65. See *Dashwood v. Jermyn*, L. R., 12 Ch. D. 776.

⁴ *Cherry v. Heming*, 4 Ex. R. 631; and *Smith v. Neale*, 2 Com. B., N. S. 67; both recognising *Donellan v. Read*, 3 B. & Ad. 899.

⁵ *M'Kay v. Rutherford*, 6 Moo. P. C. R. 413, 429.

⁶ *Knowlman v. Bluett*, 9 Law Rep., Ex 307, per Ex. Ch.; 43 L. J., Ex. 151, S. C. See ante, §§ 974, 981—984; post, § 1043.

have been charged for their whole lives,—it does not appear unreasonable to limit the statute to such actions only, as are brought to recover damages for the *non-performance* of contracts, which are not to be performed on either side within a year from the time of their being made.¹ Subject, however, to the limitation just stated, a *part-performance* is not sufficient to take the case out of the statute: but whenever it appears, either by express stipulation, or by inference from the circumstances, that the contract is not to be *completed* on either side within the year, documentary proof of the agreement must be given.² If, therefore, a farm-servant be verbally hired for a year's service, which is to commence at a future day, he cannot maintain an action against his master for discharging him before the expiration of the year, though he has faithfully performed his duty as such servant up to the date of his discharge.³ But though no action can be brought on the parol agreement, it will not be void for all purposes; for in the event of a sufficient service under it, the servant may acquire a settlement.⁴

§ 1037. Again, the mere fact that the contract may be deter- § 947
mined by the parties within the year, will not take the case out of the statute, if by its terms it purports to be an agreement, which is not to be completely performed till after the expiration of that period.⁵ A contract, therefore, to employ a solicitor during his professional life is within the statute, though it may be determined in less time than a year by the lawyer's death or retirement or misconduct.⁶ For the rule of law here is the same as in the

¹ *Souch v. Strawbridge*, 2 Com. B. 814, per Tindal, C. J. See *Re Pentreguinea Coal Co.*, 4 De Gex, F. & J. 541.

² *Boydell v. Drummond*, 11 East, 142, 156, 159.

³ *Bracegirdle v. Heald*, 1 B. & A. 722; *Snelling v. Huntingfield*, 1 C. M. & R. 20; 4 Tyr. 606, S. C.; *Britain v. Rossiter*, 48 L. J., Ex. 362; L. R., 11 Q. B. D. 123, S. C., per Ct. of App.; *Giraud v. Richmond*, 2 Com. B. 835. See *Cawthorne v. Cordrey*, 13 Com. B., N. S. 406; 32 L. J., C. P. 152, S. C.; *Banks v. Crossland*, 44 L. J., M. C. 8; 10 Law Rep., Q. B. 97, S. C.

⁴ 1 B. & A. 727, per Bayley, J.

⁵ *Birch v. Ld. Liverpool*, 9 B. & C. 392, 395; 4 M. & R. 380, S. C.; *Roberts v. Tucker*, 3 Ex. R. 632; *Dobson v. Collis*, 1 H. & N. 81; *Re Pentreguinea Coal Co.*, 4 De Gex, F. & J. 541.

⁶ *Eley v. The Positive Governm. &c. Co.*, 45 L. J., Ex. 58; Law Rep., 1 Ex. D. 20, S. C.

case of a defeasible estate, where if a party enters, he is *in* of the whole estate, though an event may afterwards occur, which would prevent the estate from continuing during the entire term contemplated in the original grant.¹ Still, if the agreement is silent as to the time within which it is to be performed, and its duration rests upon a contingency, which may or may not happen within the year, as, for instance, if it depends on the death or marriage of a party, the length of a voyage, the giving of a notice, or the like, the case is not within the statute, though the event, which is to terminate the agreement, does not in fact occur within the year.² When the contract is clearly one which is not to be performed within a year, it matters not whether it were made in this or in any other country; for, as the Act does not bar the right as well as the remedy, or in other words, does not render the agreement void, but only prevents its being enforced by action here, it applies to all foreign contracts equally with those entered into in England.³

§ 1038. The term, *interest in lands*, used in § 4, is one that has given rise to much litigation, and its meaning is not yet satisfactorily defined. Little doubt, however, can be entertained, that it extends to a contract to abate a tenant's rent;⁴ or to submit to arbitration the question whether a lease shall be granted;⁵ or to relinquish a tenancy, and let another party into possession for the residue of a term;⁶ or to permit the profits of a clergyman's living

¹ *R. v. Herstmonceaux*, 7 B. & C. 555, per Bayley, J. See ante, §§ 1006—1008.

² *Souch v. Strawbridge*, 2 Com. B. 808; *Knowlman v. Bluett*, 9 Law Rep., Ex. 1; 43 L. J., Ex. 29, S. C.; 43 L. J., Ex. 151, S. C., per Ex. Ch.; and 9 Law Rep., Ex. 307; *Ridley v. Ridley*, 34 L. J., Ch. 462, per Romilly, M. R.; 34 Beav. 478, S. C.; *Wells v. Horton*, 4 Bing. 40; 12 Moore, 177, S. C.; *Gilbert v. Sykes*, 16 East, 154; *Peter v. Compton*, Skin. 353; 1 Smith, L. C. 283, S. C.; *Fenton v. Emblers*, 3 Burr. 1278; 1 W. Bl. 353, S. C. See *Mavor v. Payne*, 3 Bing. 285; 11 Moore, 2, S. C.; *Murphy v. Sullivan*, 11 Ir. Jur., N. S. 111; *Farrington v. Donohue*, 1 R., 1 C. L. 675; *Davey v. Shannon*, L. R., 4 Ex. D. 81, per Hawkins, J.; 48 L. J., Ex. 459, S. C.

³ *Leroux v. Brown*, 12 Com. B. 801. But see *Williams v. Wheeler*, 8 Com. B., N. S. 316, per Willes, J.

⁴ *O'Connor v. Spaight*, 1 Sch. & Lef. 306.

⁵ *Walters v. Morgan*, 2 Cox, Ch. R. 369.

⁶ *Buttemere v. Hayes*, 5 M. & W. 456; 7 Dowl. 489, S. C.; *Smith v.* (3758)

to be received by a trustee;¹ or to repay a loan out of the future rent of a farm;² or to become a partner in a colliery, which was to be demised by the partnership upon royalties;³ or to take furnished lodgings;⁴ or to exercise sporting rights over land, and carry off a portion of the game killed;⁵ or to convey an equity of redemption;⁶ or to procure, as a broker, the sale of a lease.⁷ On the other hand, it appears that an equitable mortgage by the deposit of title-deeds;⁸ a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises;⁹ a contract relating to the investigation of a title to land;¹⁰ an agreement for board and lodging, no particular rooms being demised;¹¹ an agreement between a landlord and tenant, that the former shall take at a valuation certain fixtures left by the latter in the house;¹² an undertaking by a landlord to build a water-closet for his tenant;¹³ or to put the house in repair and put more furniture into it;¹⁴ an agreement for the use of a graving dock during the repairs of a ship;¹⁵ or a contract that an arbitrator shall determine the amount of damages sustained by a party, in consequence of a road having

Tombs, 3 Jur. 72, Q. B.; *Cocking v. Ward*, 1 Com. B. 858; *Kelly v. Webster*, 12 Com. B. 283; *Smart v. Harding*, 15 Com. B. 652; *Hodgson v. Johnson*, 28 L. J., Q. B. 88; E. B. & E. 685, S. C.; *Ronayne v. Sherrard*, I. R., 11 C. L. 146.

¹ *Alchin v. Hopkins*, 1 Bing. N. C. 102; 4 M. & Sc. 615, S. C.

² Ex. p. Hall, re Whitting, L. R., 10 Ch. D. 615, per Ct. of App.; 48 L. J., Bk. 79, S. C.

³ *Caddick v. Skidmore*, 2 De Gex & J. 52, per Lord Cranworth, C.; 27 L. J., Ch. 153, S. C.

⁴ *Edge v. Strafford*, 1 C. & J. 391; 1 Tyr. 293, S. C.; *Inman v. Stamp*, 1 Stark. R. 12, per Ld. Ellenborough; *Mechelen v. Wallace*, 7 A. & E. 49; 2 N. & P. 224, S. C.; *Vaughan v. Hancock*, 3 Com. B. 766.

⁵ *Webber v. Lee*, 51 L. J., Q. B. 174, 485; L. R., 9 Q. B. D. 315, S. C., per Ct. of App.

⁶ *Massey v. Johnson*, 1 Ex. R. 255, per Rolfe, B. See *Toppin v. Lomas*, 16 Com. B. 145.

⁷ *Horsey v. Graham*, 5 Law Rep., C. P. 9; 39 L. J., C. P. 58, S. C.

⁸ *Russel v. Russel*, 1 Br. C. C. 269; 12 Ves. 197.

⁹ *Hoby v. Roebuck*, 7 Taunt. 157.

¹⁰ *Jeakes v. White*, 6 Ex. R. 873.

¹¹ *Wright v. Stavert*, 29 L. J., Q. B. 161; 2 E. & E. 721, S. C.

¹² *Hallen v. Runder*, 1 C. M. & R. 266; 3 Tyr. 959, S. C.; *Lee v. Gaskell*, 45 L. J., Q. B. 540; L. R., 1 Q. B. D. 700, S. C.

¹³ *Mann v. Nunn*, 43 L. J., C. P. 241.

¹⁴ *Angell v. Duke*, 44 L. J., Q. B. 78; 10 Law Rep., Q. B. 174, S. C.

¹⁵ *Wells v. Kingston-upon-Hull*, 10 Law Rep., C. P. 402; 44 L. J., C. P. 257, S. C.

been made through his lands;¹ are not within the statute. How far the Act applies to profits à prendre, easements, and other incorporeal rights relating to lands, is a question by no means clear; though, on principle, it ought to extend to all agreements respecting rights of common, rights of way, grants of rent-charge, tolls, or licences coupled with an interest, however trifling, in lands.²

§ 1039. The question, whether *shares* in a joint-stock company,³ § 949 possessed of *real estate*, could be regarded as an interest in lands, was one which, formerly, was much discussed in Westminster Hall. The Legislature has, however, to a great extent set the matter at rest, by enacting that all shares issued either under the old Joint-Stock Companies Act of 1856, or under the present Companies Act of 1862, “shall be personal estate, and shall not be of the nature of real estate.”⁴ In many cases, too, where the company has been incorporated by statute, Parliament has expressly declared that the shares shall be deemed personal estate.⁵ So, even in the absence of such a declaration, if the company be *incorporated* by statute or by charter from the Crown, and the real property be vested in the corporation, who are to have the sole management of it, the shares of the individual proprietors will be personalty, and will consist of nothing more than a right to participate in the net produce of the property of the company.⁶

¹ *Gillanders v. Ld. Rossmore, Jones, Ex. R. 504; Griffiths v. Jenkins, 3 New R. 489, per Crompton & Shee, Js., in Bail Ct.*

² *Cook v. Stearns, 11 Mass. 533; R. v. Salisbury, 8 A. & E. 716.*

³ As to shares in an ordinary private partnership, where the partnership are owners of real estate, see *Ashworth v. Munn, L. R., 15 Ch. D. 363; 50 L. J., Ch. 107, per Ct. of App., S. C.*

⁴ 19 & 20 V., c. 47, § 15; 25 & 26 V., c. 89, § 22.

⁵ This is so in the case of all companies subject to the provisions of “The Cos’. Clauses Consolid. Act, 1845,” 8 & 9 V., c. 16, § 7. So, also, in the case of the Lancaster Canal Co., Mon. & B. 94; of the Lond. & Birmingham Ry. Co., see *Bradley v. Holdsworth, 3 M. & W. 422*, and of many others. Again, stock, to which the Colonial Stock Act., 1877, applies, is personal estate, 40 & 41 V., c. 59, § 22.

⁶ *Bligh v. Brent, 2 Y. & C., Ex. R. 268; Bradley v. Holdsworth, 3 M. & W. 422; Hibblewhite v. M’Moline, 6 M. & W. 214, per Parke, B.; 2 Rail. Ca. 67, S. C.; Humble v. Mitchell, 11 A. & E. 205; 2 Rail. Ca. 70, S. C.; Baxter v. Brown, 7 M. & Gr. 216, per Tindal, C. J.; Hilton v. Geraud, 1 De Gex & Sm. 187; Watson v. Spratley, 10 Ex. R. 237, per Martin, B., 244, per Parke, B.; Bulmer v. Norris, 9 Com. B., N. S. 19. See *Edwards v. Hall, 25 L. J., Ch. 82; 6 De Gex, M. & G. 74, S. C.*; overruling *Ware v. Cumberledge,**

The same doctrine will, it seems, apply, though the company be *unincorporated*,—as, for instance, if it be a mining co-partnership conducted on the cost-book principle,—provided that trustees be seized of the real estate in trust to use it for the benefit of the shareholders, and to make profits out of it, as part of the stock in trade; and provided that the interest of the shareholders be confined to those profits.¹ If, however, the trustees hold the real estate in trust for themselves and the co-adventurers, present and future, in proportion to their number of shares, then there will be a direct trust in the realty; and, consequently, neither a bargain for, nor a transfer of, a share in such trust can be made without a note in writing.² The question—under which of these two species of trusts the lands of any particular company may be held—is one of fact, to be determined in each case by the jury.³ If the freehold, which forms the basis and subject-matter of the trade of an unincorporated company, be vested in the collective body, the shares of the individual co-partners seem clearly to fall within the meaning of the 4th section.⁴

§ 1039A. After vehement controversy amongst the advocates, and not a few inconsistent rulings from the judges, it has at length been decided, that neither railway debenture stock created under the provisions of the Companies Clauses Act, 1863,⁵ nor railway debentures, are an interest in lands.⁶

20 Beav. 503; and see, also, *Powell v. Jessopp*, 18 Com. B. 336; and *Taylor v. Linley*, 2 De Gex, F. & J. 84.

¹ *Watson v. Spratley*, 10 Ex. R. 222. See *Myers v. Perigal*, 2 De Gex, M. & G. 599; *Walker v. Bartlett*, 18 Com. B. 845; *Hayter v. Tucker*, 4 Kay & J. 243; *Bennett v. Blain*, 33 L. J., C. P. 63; 15 Com. B., N. R. 518, S. C.; *Freeman v. Gainsford*, 34 L. J., C. P. 95; *Entwistle v. Davis*, 36 L. J., Ch. 825; 4 Law Rep., Eq. 272, S. C.

² *Id.*; *Baxter v. Brown*, 7 M. & Gr. 198; *Boyce v. Green*, Batty, 603. See *Morris v. Glynn*, 27 Beav. 218.

³ *Watson v. Spratley*, 10 Ex. R. 222, per Parke & Alderson, Bs.

⁴ See, further, as to the transfer of shares in joint stock companies, ante, § 993.

⁵ 26 & 27 V., c. 118, § 22.

⁶ *Attree v. Hawe*, L. R., 9 Ch. D. 337, per Ct. of App.; 47 L. J., Ch. 863, S. C.; overruling S. C. in 47 L. J., Ch. 157; *Holdsworth v. Davenport*, 46 L. J., Ch. 20; Law Rep., 3 Ch. D. 185, S. C.; *Walker v. Milne*, 11 Beav. 507; 18 L. J., Ch. 288, S. C. These cases overrule *Ashton v. Ld. Langdale*, 4 De Gex & Sm. 402; 20 L. J., Ch. 234, S. C.; and *Chandler v. Howell*, Law Rep., 4 Ch. D. 651; 46 L. J., Ch. 25, S. C.

§ 1040. It is now also distinctly determined, that *scrip* and *shares* § 950 in joint-stock companies, whether incorporated or unincorporated, are not “*goods, wares and merchandises*,” within the 17th section of the Act.¹ As this point was ruled on the ground that such shares are mere choses in action,² the judgment in which it was determined has since been held³ to have decided in the negative another question, respecting which all the judges were once equally divided in opinion; namely, whether contracts for the sale of stock or exchequer bills were within the Act.⁴

§ 1041.⁵ The principal difficulties in interpreting what it meant § 951 by an “interest in lands,” have arisen in applying that term to cases, where trees, *growing crops*, or other things annexed to the freehold, have formed the subject of the contract; and here, the decisions of the courts, so far from furnishing a safe guide, only assist in confusing the student, since,—to use the words of Lord Abinger,—“no general rule is laid down in any of them, that is not contradicted by some other.”⁶ Indeed, the judges themselves have not yet agreed upon any uniform test, by which to try the merits of this question.⁷ In some cases they have endeavoured to solve it by reference to the law of emblements; and have held that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land.⁸ In other cases the test has been, whether the property in dispute could have been seized in execution at common law;⁹ in others, again, a dis-

¹ *Humble v. Mitchell*, 11 A. & E. 205; 2 Rail. Ca. 70, S. C.; *Hibblewhite v. M'Morine*, 6 M. & W. 214, per Parke, B.; *Knight v. Barber*, 16 M. & W. 66; *Tempest v. Kilner*, 3 Com. B., 249; *Bowlby v. Ball*, id. 284, *Duncuft v. Albrecht*, 12 Sim. 189; *Watson v. Spratley*, 10 Ex. R. 222.

² But in the case of *In re Jackson*, Ex parte Bk. of Manchester, 40 L. J., Bk. 57; 12 Law Rep., Eq. 354, S. C.; Bacon, V.-C., held that shares in a company were not “things in action” within the meaning of 32 & 33 V., c. 71, § 15, subs. 5; which is now re-enacted in 46 & 47 V., c. 52, § 44, subs. 3.

³ *Heseltine v. Siggers*, 1 Ex. R. 856.

⁴ *Pickering v. Appleby*, Com. Rep. 354, cited in *Colt v. Nettervill*, 2 P. Wms. 308, per Ld. Ch. King.

⁵ Gr. Ev. § 271, in part as to first four lines.

⁶ *Rodwell v. Phillips*, 9 M. & W. 505.

⁷ See 1 Sug. V. & P. 141—158.

⁸ *Rodwell v. Phillips*, 9 M. & W. 505; *Jones v. Flint*, 10 A. & E. 758.

⁹ *Dunne v. Ferguson*, Hayes, 543; *Rodwell v. Phillips*, 9 M. & W. 505; *Jones v. Flint*, 10 A. & E. 758.

inction has been drawn between *fructus industriales*, and the natural products of the soil;¹ while, in not a few, the decisions have rested, partly on the legal character of the principal subject-matter of the contract, but principally on the consideration, whether, in order to effectuate *the intention* of the parties, it were necessary to give the vendee an interest in the land.²

§ 1042. Such being the uncertain state of the law, the following § 952 propositions are submitted with much diffidence. First, a contract for the purchase of *fruits of the earth, ripe*, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them.³ Secondly, a sale of any *growing* produce of the earth, *reared annually by labour and expense*, and in actual existence at the time of the contract,—as, for instance, a growing crop of corn,⁴ or hops,⁵ or potatoes,⁶ or turnips,⁷—is not within the 4th section of the statute, though the purchaser is to harvest or dig them. Whether the same rule would apply to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labour by which they are produced *within the year* in which that labour is bestowed, and consequently, as it seems, do not fall within the law of emblements,⁸ is a question which still remains to be decided. Thirdly, an agreement respecting the sale of a crop of growing fruit,⁹ or grass,¹⁰ or of

¹ Jones v. Flint, 10 A. & E. 758, 759, 760; Evans v. Roberts, 5 B. & C. 832; Rodwell v. Phillips, 9 M. & W. 503, per Ld. Abinger.

² Jones v. Flint, 10 A. & E. 759.

³ Parker v. Staniland, 11 East, 362; Cutler v. Pope, 1 Shepl. 337.

⁴ Jones v. Flint, 10 A. & E. 753; 2 P. & D. 594, S. C.

⁵ Per Parke, B., in Rodwell v. Phillips, 9 M. & W. 503, questioning Waddington v. Bristow, 2 B. & P. 452. See, also, Graves v. Weld, 5 B. & Ad. 119, 120.

⁶ Sainsbury v. Matthews, 4 M. & W. 343; 7 Dowl. 23, S. C.; Evans v. Roberts, 5 B. & C. 829; 8 D. & R. 611, S. C.; Warwick v. Bruce, 2 M. & Sel. 205.

⁷ Dunne v. Ferguson, Hayes, 540. Emmerson v. Heelis, 2 Taunt. 38, *contrà*, must be considered as overruled by Evans v. Roberts, 5 B. & C. 833, 834, and by Jones v. Flint, 10 A. & E. 759.

⁸ Graves v. Weld, 5 B. & Ad. 105, 118—120; 1 Sug. V. & P. 156.

⁹ Rodwell v. Phillips, 9 M. & W. 501; resolving a doubt suggested by Littledale, J., in Graves v. Weld, 5 B. & Ad. 116.

¹⁰ Crosby v. Wadsworth, 6 East, 602; Carrington v. Roots, 2 M. & W. 248.

standing underwood,¹ growing poles,² or timber, is within the fourth section, and a written contract of sale cannot be dispensed with. In two cases an agreement to sell growing timber was held not to convey any interest in the land, but in one of these the timber was to be felled and taken away "as soon as possible" by the purchaser,³ and in the other the vendor had contracted to sell the timber at so much per foot, and that contract the court regarded in the same light as if it had related to the sale of timber already felled.⁴ Fourthly, if the land itself is agreed to be sold or let, and the vendee or tenant contracts to purchase the growing crops, this last contract, though the crops taken under it may form the subject of a distinct valuation, will be so incorporated with the agreement relating to the land as to be inseparable from it, and will consequently fall within the 4th section of the Act.⁵

§ 1043. Where growing crops do not amount to an interest in lands, it is clear that an agreement respecting them will fall within the 17th section; and, therefore, at first sight, it may seem unimportant to raise any dispute upon the subject. But, in truth, two material distinctions exist between the 4th and the 17th sections; for, first, contracts under the former must be stamped, while those under the latter are exempt;⁶ and next, no writing is required by the 17th section, if the subject-matter of the contract is under the value of 10*l.*, or if there has been a part-payment, or a part-acceptance, by the purchaser.⁷ It is true, that parol agreements touching lands will be enforced, if they have been unequivocally performed in some *material* part; as, for instance, if possession has been distinctly taken under them and rent paid, or the like;⁸ but, still, such agreements will not be excluded from the

¹ *Scorell v. Boxall*, 1 Y. & J. 396.

² *Teal v. Auty*, 2 B. & B. 99; 4 Moore, 542, S. C.

³ *Marshall v. Green*, Law Rep., 1 C. P. D. 35; 45 L. J., C. P. 153, S. C.

⁴ *Smith v. Surman*, 9 B. & C. 561; 4 M. & R. 455, S. C.; explained by *Ld. Abinger* in *Rodwell v. Phillips*, 9 M. & W. 505.

⁵ *Ld. Falmouth v. Thomas* 1 C. M. & R. 89; *Mayfield v. Wadsley*, 3 B. & C. 366, per *Littledale, J.*

⁶ 33 & 34 V., c. 97, Sch. tit. Agreement.

⁷ *Ante*, § 1020.

⁸ *Maddison v. Alderson*, L. R., 8 App. Cas. 467, per *Dom. Proc.*; 52 L. J., Q. B. 737, S. C. *Lanyon v. Martin*, 13 L. R., Ir. 297. This case deserves attentive perusal. See *Humphreys v. Green*, L. R., 10 Q. B. D. 148, per *Ct. of*

operation of the statute by any part-performance, which does not place the acting party in such a position, that it would be a fraud upon him if the contract were not completed.¹

§ 1044. As the 17th section is confined to contracts for the sale of goods, it does not apply to a contract, which is substantially one for work and labour,² or to an agreement to procure goods for another, and to convey them to a certain place.³ Neither does this section, any more than the 4th,⁴ extend to fixtures, which, though chattels, are not goods, wares, or merchandise.⁵ But where the principal subject-matter of a contract is the sale of goods of the price or value of 10*l.* or upwards, the contract falls within the section, though it includes other matters,—as, for instance, the agistment of cattle,—to which the statute does not apply.⁶ With respect to the price, which must be 10*l.* or upwards in order to render a writing necessary, it may be observed, that if a person purchases several articles at one time, though at distinct prices, the transaction will be regarded as one entire contract; and, consequently, if the whole purchase-money amounts to 10*l.*, the case will be within the statute, though none of the articles taken separately may be of that value.⁷ § 956

§ 1045. The *acceptance* and *actual receipt* mentioned by the statute⁸ have given rise to much litigation; but, without entering § 957

App.; 52 L. J., Q. B., 140, S. C.; Dale v. Hamilton, 5 Hare, 369; 2 Phill. 266, S. C.; Lincoln v. Wright, 28 L. J., Ch. 705; 4 De Gex & J. 16, S. C.; Nunn v. Fabian, 35 L. J., Ch. 140, per Ld. Cranworth, C.; 1 Law Rep., Ch. App. 35, S. C.; Howe v. Hall, I. R., 4 Eq. 242; Williams v. Evans, 44 L. J., Ch. 319; 19 Law Rep., Eq. 547, S. C. Sed qu. as to this last case.

¹ Maddison v. Alderson, L. R., 8 App. Cas. 467; Clinan v. Cooke, 1 Sch. & Lef. 41, per Ld. Redesdale. See Haigh v. Kaye, 41 L. J., Ch. 567, per Lds. Js.; Pulbrook v. Lawes, 45 L. J., Q. B. 178; L. R., 1 Q. B. D. 284, S. C.

² Clay v. Yates, 25 L. J., Ex. 237; 1 H. & N. 73, S. C. But a contract to make a set of teeth to fit the mouth of the employer is not a contract for work and labour, so as to dispense with the statute; Lee v. Griffin, 30 J. J., Q. B. 252; 1 B. & S. 272, S. C. Neither is an agreement by an artist to paint a picture such a contract; Isaacs v. Hardy, 1 Cab. & El. 287 per Matthew, J.

³ Cobbold v. Caston, 1 Bing. 399.

⁴ Ante, § 1038.

⁵ Horsfall v. Hey, 2 Ex. R. 778.

⁶ Harman v. Reeve, 25 L. J., C. P. 257.

⁷ Baldey v. Parker, 2 B. C. 37; 3 D. & R. 220, S. C. See, also, Elliott v. Thomas, 3 M. & W. 170; Bigg v. Whisking, 14 Com. B. 195.

⁸ See ante, § 1020.

into any lengthened discussion of the numerous decisions which bear on this point, it may suffice to observe, that each of the two terms has a distinct and separate meaning; ¹ that a compliance with both requisites is necessary to satisfy the statute; ² that an acceptance and receipt of *part* of the goods will be as operative as an acceptance and receipt of the whole; ³ that in cases relating to the purchase of *specific* goods the acceptance may precede the receipt as well as follow it or be contemporaneous with it; ⁴ that an agent authorized to receive goods is not consequently authorised to accept them; ⁵ that the receipt, which itself implies delivery, ⁶ must be such as will preclude the vendor from retaining any lien on the goods, ⁷ and that the acceptance and receipt together must be such as will preclude the purchaser from objecting to their quantity or quality. ⁸ Indeed the broad question,—which must be submitted as one of fact to the jury, ⁹—is whether the circumstances prove a delivery by the vendor, and an acceptance and actual receipt by the vendee, intended by *both parties* to have the effect of transferring the right of possession from the one to the other. ¹⁰ The mere

¹ *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261, S. C.

² *Id.*

³ *Morton v. Tibbett*, 15 Q. B. 434, per Ld. Campbell; *Kershaw v. Ogden*, 34 L. J., Ex. 159; 3 H. & C. 717, S. C.

⁴ *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J.; Q. B. 261, S. C., resolving a doubt expressed in *Saunders v. Topp*, 4 Ex. R. 390, and adopting in part a dictum of Ld. Campbell's in *Morton v. Tibbett*, 15 Q. B. 434.

⁵ *Nicholson v. Bower*, 1 E. & E. 172; *Hansom v. Armitage*, 5 B. & A. 557; *Norman v. Phillips*, 14 M. & W. 276.

⁶ *Saunders v. Topp*, 4 Ex. R. 394, per Parke, B.

⁷ *Baldev v. Parker*, 2 B. & C. 37, 44; 3 D. & R. 220, S. C.; *Maberley v. Sheppard*, 10 Bing. 101, 102, per Tindal, C. J.; *Smith v. Surman*, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, S. C.; *Tempest v. Fitzgerald*, 3 B. & A. 680, 684, per Holroyd, J.; *Carter v. Toussaint*, 5 B. & A. 859, per Bayley, J.; *Holmes v. Hoskins*, 9 Ex. R. 753; *Cusack v. Robinson*, 1 B. & S. 308, per Blackburn, J.; 30 L. J., Q. B. 264, S. C.; *Grice v. Richardson*, 47 L. J., Pr. C. 48, 50.

⁸ *Norman v. Phillips*, 14 M. & W. 283, per Alderson, B.; *Smith v. Surman*, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, S. C.; *Howe v. Palmer*, 3 B. & A. 321, 325, per Holroyd, J.; *Hanson v. Armitage*, 5 B. & A. 559, per Abbott, C. J.; *Acebal v. Levy*, 10 Bing. 384, per Tindal, C. J. In *Morton v. Tibbett*, 15 Q. B. 428, the Ct. of Q. B. denied that the proposition stated in the text was law; but the judgment, though very elaborate, is by no means satisfactory on this point. See, also, *Parker v. Wallis*, 5 E. & B. 21; and *Currie v. Anderson*, 29 L. J., Q. B. 90, per Crompton, J.; 2 E. & E. 600, S. C.

⁹ *Morton v. Tibbett*, 15 Q. B. 441; *Bushel v. Wheeler*, *id.* 442, n.

¹⁰ *Phillips v. Bistolli*, 2 B. & C. 514; recognised in *Maberly v. Sheppard*, (3766)

marking of goods, therefore, by the vendee in the vendor's shop, when they are to be paid for by ready money, will not suffice, as this act, though it may constitute a valid acceptance,¹ is not such a receipt by the vendee as will deprive the vendor, even when he assents to it, of his right of lien.²

§ 1046. But where a party, having agreed to purchase some wool, § 957 had it sent to another warehouse for deposit, and then weighed it and packed it in his own sheeting, this was held to be a sufficient acceptance and receipt, though by the course of dealing, he was not to remove it to its ultimate place of destination before payment, and no payment had been made. The court considered that, under these circumstances, the vendor had not what could properly be called a lien on the wool, but merely a special interest in it, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the purchaser.³ So, where some horses were purchased of a dealer who kept a livery stable, and the buyer directed the seller to keep them at livery, upon which they were transferred from the sale to the livery stable; it was held that this direction was equivalent to an acceptance and receipt of the horses, as the buyer became liable for their keep, which would not have been the case, unless they had actually gone into his possession.⁴ So, where a timber merchant, having bought

10 Bing. 102. See *Curtis v. Pugh*, 10 Q. B. 111; *Saunders v. Topp*, 4 Ex. R. 390; and *Tomkinson v. Staight*, 25 L. J., C. P. 85; 17 Com. B. 697, S. C.

¹ *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261, S. C.

² *Baldey v. Parker*, 2 B. & C. 37; 3 D. & R. 220, S. C.; *Bill v. Bament*, 9 M. & W. 36; *Proctor v. Jones*, 2 C. & P. 532; *Kealy v. Tenant*, 13 Ir. Law R., N. S. 394. These cases seem virtually to overrule *Hodgson v. Le Bret*, 1 Camp. 233; and *Anderson v. Scot*, id. 235, n. See *Saunders v. Topp*, 4 Ex. R. 390; and *Acraman v. Morrice*, 8 Com. B. 449.

³ *Dodsley v. Varley*, 12 A. & E. 632; 2 P. & D. 448, S. C.; *Langton v. Higgins*, 4 H. & N. 402; *Aldridge v. Johnson*, 7 E. & B. 885; *Kershaw v. Ogden*, 34 L. J., Ex. 159; 3 H. & C. 717, S. C. See *Simmonds v. Humble*, 13 Com. B., N. S. 258. As to the effect of handing over a sample of the goods, see *Gardner v. Grout*, 2 Com. B., N. S. 340.

⁴ *Elmore v. Stone*, 1 Taunt. 458; explained and recognised by *Bayley, J.*, in *Smith v. Surman*, 9 B. & C. 570. See *Castle v. Swarder*, 30 L. J., Ex. 310, per Ex. Ch.; 6 H. & N. 828, S. C., reversing a decision in Ex., reported 5 H. & N. 281; *Carter v. Toussaint*, 5 B. & A. 855; 1 D. & R. 515, S. C.; *Beaumont v. Brengeri*, 5 Com. B. 301; *Holmes v. Hoskins*, 9 Ex. R. 753; *Marvin v. Wallace*, 25 L. J., Q. B. 369; 6 E. & B. 726, S. C. See *Taylor v. Wakefield*, 6 E. & B. 765.

some growing trees by verbal contract, cut down six of them and sold the lops and tops, the vendor of the trees was held to be too late in attempting to countermand the sale.¹ So, where a stack of hay had been purchased by parol, and afterwards the vendee sold part to a third person, who removed it, the jury were held to be justified in finding an acceptance and actual receipt.²

§ 1047. A person, intrusted with another's goods to sell, may § 958
himself become the purchaser by parol, and may do subsequent acts which will amount to an acceptance and receipt on his part; as for instance, if he sells them to a stranger on his own account.³ The evidence, however, to sustain such a case must be extremely clear.⁴

§ 1048. Where the goods are ponderous and incapable of being § 959
handed over from one to another, a constructive delivery,—such, for example, as the giving up the key of the warehouse in which they are deposited, or the delivery of other indicia of property,—will be sufficient.⁵ But, in all these cases, the acts of the parties, in order to be tantamount to a delivery and actual receipt, must be unequivocal;⁶ and, therefore, where goods are lodged with a warehouseman as agent for the vendor, the mere acceptance and retainer by the purchaser of the warrant or delivery order, will not amount to an actual receipt of the goods, so as to bind the bargain;⁷ but to have this effect, the document must be lodged by the purchaser with the warehouseman, who must then, as it were, attorn to him, or in other words, agree to hold the property henceforth as his agent.⁸

§ 1049. One of the chief difficulties in construing this branch § 960

¹ *Marshall v. Green*, Law Rep., 1 C. P. D. 35; 45 L. J., C. P. 153, S. C.

² *Chaplin v. Rogers*, 1 East, 192; recognised by Bayley, J., in 9 B. & C. 570. See *Stoveld v. Hughes*, 14 East, 308; and *Searle v. Keeves*, 2 Esp. 598.

³ *Edan v. Dudfield*, 1 Q. B. 302; 4 P. & D. 656, S. C.; *Lillywhite v. Deveaux*, 15 M. & W. 289, 291.

⁴ *Id.*

⁵ *Chaplin v. Rogers*, 1 East, 195 per *Ld. Kenyon*.

⁶ *Nicholle v. Plume*, 1 C. & P. 272, per *Best*, C. J.; *Edan v. Dudfield*, 1 Q. B. 307.

⁷ *M'Ewan v. Smith*, 2 H. of L. Cas. 309.

⁸ *Farina v. Home*, 16 M. & W. 119, 123, per *Parke*, B.; *Bentall v. Burns*, 3 B. & C. 423; 5 D. & R. 284, S. C.

of the statute, is where goods, verbally purchased, are delivered to a carrier or wharfinger named by the vendee; and here it seems to have been once considered, that such delivery was sufficient to satisfy the statute.¹ However, it has since been held, that though the delivery to the carrier may be a delivery to the purchaser, the acceptance of the carrier is not an acceptance by him;² and therefore, where timber, verbally ordered, was forwarded in this manner to the purchaser, but he refused to take it in, the Court of Exchequer held that the jury were not warranted in finding an acceptance, though an invoice had been sent to the purchaser and retained by him, and though he had omitted to give notice to the vendor of his refusal to take the goods till after the expiration of more than a month.³ It is true that, under somewhat similar circumstances, the Court of Queen's Bench has pronounced an opposite decision; but in that case the vendee did not reject the goods for seven months; and Mr. Justice Coleridge rested his judgment on the ground that the inspection of the goods was to be made within a reasonable time.⁴ Whether this distinction can be supported is another question; but thus much is at least clear,—that if a purchaser, who has the right of approval, retains for an unreasonable time goods which have been delivered to him, he will lose his right to object to them, and his conduct will amount to an acceptance;⁵ and further, the same rule will hold, if the goods have been delivered to a general agent of the purchaser, who was authorised by him to examine their quality.⁶ It is also clear, that, if the purchaser of goods takes upon himself

¹ *Hart v. Sattley*, 3 Camp. 528, per Chambre, J. See *Dawes v. Peck*, 8 T. R. 330; and *Dutton v. Solomonson*, 3 B. & P. 582.

² *Johnson v. Dodgson*, 2 M. & W. 656, per Parke, B. See *Acebal v. Levy*, 10 Bing. 376; 4 M. & Sc. 217, S. C.; *Coats v. Chaplin*, 3 Q. B. 483; *Nicholson v. Bower*, 28 L. J., Q. B. 97; 1 E. & E. 172, S. C.

³ *Norman v. Phillips*, 14 M. & W. 277; *Meredith v. Meigh*, 2 E. & B. 364; *Hunt v. Hecht*, 8 Ex. R. 814; *Hart v. Bush*, 27 L. J., Q. B. 271; E. B. & E. 494, S. C.; *Coombs v. Bristol & Ex. Ry. Co.*, 27 L. J., Ex. 401; *Smith v. Hudson*, 34 L. J., Q. B. 145; 6 B. & S. 431, S. C.

⁴ *Bushel v. Wheeler*, 8 Jur. 532; 15 Q. B. 442, n., S. C.; explained by *Alderson, B.*, in 14 M. & W. 282. See, also, *Currie v. Anderson*, 29 L. J., Q. B. 87; 2 E. & E. 592, S. C.

⁵ *Coleman v. Gibson*, 1 M. & Rob. 168, per *Ld. Tenterden*; *Norman v. Phillips*, 14 M. & W. 279, per *Alderson, B.*; *Bowes v. Pontifex*, 3 Fost. & Fin. 739, per *Bramwell, B.*

⁶ *Norman v. Phillips*, 14 M. & W. 283, per *Alderson, B.*

to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property continuing in the vendor,—as, for instance, if he changes their original destination, and resells them to a third party at a profit,—the jury will be justified in finding that he has accepted the goods and actually received them, though they have been merely delivered to his carriers, and he himself has never seen them.¹

§ 1050. The *Will Act*,²—which came into operation on the 1st of January, 1838,—has effected extensive amendments in the law respecting these instruments; and it will here be expedient to notice such of the alterations as relate to the *execution of wills*. By this Act, which we owe to the enlightened exertions of Lord Langdale, every will, codicil, or other testamentary disposition,—including appointments made by will, or by writing in the nature of a will, in exercise of any power,³ whether such power were created before or after the Act came into operation,⁴ but excluding nuncupative wills, disposing of personal estate, made by soldiers in actual military service, or by seamen and mariners at sea,⁵—must, if made, or re-executed, or re-published, or revived by any codicil, on or after the 1st of January, 1838,⁶ be in writing, “and be signed at the foot or end thereof by the testator, or by some other person in his presence⁷ and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”⁸ Appointments by will, if executed in this manner, are valid, although the power, under which they were made, expressly

¹ *Morton v. Tibbett*, 15 Q. B. 428, explained by *Martin, B.*, in *Hunt v. Hecht*, 8 Ex. R. 818.

² 7 W. 4 & 1 V., c. 26.

³ §§ 1 & 10.

⁴ *Hubbard v. Lees*, 35 L. J., Ex. 169; 1 Law Rep., Ex. 255; 4 H. & C. 418, S. C.

⁵ § 11. As to nuncupative wills, see post, § 1062, and 1 Will. on Ex. 62—89.

⁶ § 34.

⁷ *Kevil v. Lynch*, I. R., 8 Eq. 244.

⁸ § 9. § 7 of the Indian Will Act, No. 25, of 1838, contains the same language, with the single omission of the words “shall attest and” after “witnesses,” and before “shall subscribe.” This alteration makes no difference in the construction, per *Ld. Brougham* in *Casement v. Fulton*, 5 Moo. P. C. R. 137.

requires some additional solemnity in the execution;¹ and all wills, executed as above stated, shall be deemed good without other publication.²

§ 1051. An exception, indeed, is recognised as to the wills of § 965 petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, allowances, and moneys payable in respect of services in her Majesty's Navy;³ for with the view of preventing frauds, to which seafaring men are supposed to be more than ordinarily subject, these wills must be drawn, executed, and attested in a more formal manner than instruments made by other persons, who are presumed to have greater experience.⁴

§ 1052. In contrasting these provisions with those contained in § 966 the Statute of Frauds,⁵ it will be observed, first, that they are not confined, as in the Act of Charles II., to devises disposing of freehold realty, but that they apply equally to all wills, whether of *freehold*, *copyhold*, or *personal estate*; secondly, that two attesting witnesses are sufficient and necessary in all cases, while the Statute of Frauds required the signature of at least three to all devises of freehold realty, but was silent as to other wills; thirdly, that the testator must make or acknowledge⁶ his signature in the *actual contemporaneous presence* of these witnesses, though this was not necessary under the former Act; and fourthly, that the will must be signed "at the foot or end thereof," whereas, in former wills, the signature was valid, if it appeared on any part of the instrument.⁷

¹ § 10. See, however, and compare *Buckell v. Bleakhorn*, 5 Hare, 131; *Collard v. Sampson*, 16 Beav. 543; S. C. on appeal, 4 De Gex, M. & G. 224; *West v. Ray*, 1 Kay, 385; *Taylor v. Meads*, 34 L. J., Ch. 203; 4 De Gex, J. & S. 597, S. C., per Ld. Westbury; and *Smith v. Adkins*, 14 Law Rep., Eq., 462, per Ld. Romilly.

² § 13. As to the meaning of the phrase "publication of a will," see *Vincent v. Bp. of Sodor & Man*, 4 De Gex & Sm. 294, and cases there cited.

³ § 12.

⁴ 11 G. 4 & 1 W. 4, c. 20, §§ 48—50; 28 & 29 V., c. 72, & c. 112, § 1.

⁵ 29 C. 2, c. 3, § 5; 7 W. 3, c. 12, § 3, Ir.

⁶ See *Morritt v. Douglas*, 42 L. J., Pr. & Mat. 10; 3 Law Rep., P. & D. 1, S. C.

⁷ Post, § 1057.

It has been further laid down as a rule deducible from the spirit, if not from the express language, of the Act, that both the attesting witnesses must *subscribe* the will *at the same time*, and *in each other's presence*; and therefore, where a will was signed in the presence of a single witness who then attested it,—and subsequently, the testator, in the presence of this witness and another, acknowledged his signature, whereupon the second witness also subscribed the will,—this was held to be insufficient, though on the second occasion the first witness had acknowledged, but had not re-written, his own signature.¹ So, where one of the witnesses to a will, on the occasion of its being re-executed in his presence, retraced his signature with a dry pen,² and where another witness, under similar circumstances, corrected an error in his name as previously written, and added the date,³ the court held that neither of these acts was a sufficient compliance with the statute, which, in requiring the actual subscription of the witnesses, rendered it incumbent on them to do some act that should be apparent on the face of the instrument, and that should amount to such a signature as would be descriptive of the witness, whether by a mark, or by initials, or by writing the full name.⁴

§ 1053. As the word “presence,” mentioned in the statute, § 967 means not only a bodily, but a mental, presence, the Act will not be satisfied, if either of the witnesses be insane, intoxicated, asleep, or, it would seem, even blind⁵ or inattentive, at the time when the will is signed or acknowledged;⁶ and so strictly has

¹ *Casement v. Fulton*, 5 Moo. P. C. R. 139; *Moore v. King*, 3 Curt. 243; *In re Simmonds*, id. 79; *In re Allen*, 2 Curt. 331; *Slack v. Rusteed*, 6 Ir. Eq. R., N. S. 1. See, however, *Faulds v. Jackson*, 6 Ec. & Mar. Cas. Supp. I.; and *In re Webb*, 1 Deane, Ec. R. 1, in which last case, Sir J. Dodson, on the authority of an unreported decision of Sir H. Fust, in *Chodwick v. Palmer*, held that the witnesses need not subscribe the will in the presence of each other. Therefore, *quære*.

² *Playne v. Scriven*, 7 Ec. & Mar. Cas. 222, per Sir H. Fust; 1 Roberts. 772, S. C. See post, § 1113.

³ *Hindmarsh v. Charlton*, 8 H. of L. Cas. 160.

⁴ *In re Enyon*, 42 L. J., Pr. & Mat. 52; 3 Law Rep., P. & D. 92, S. C.

⁵ See *In re Mullen*, I. R., 5 Eq. 309, where a blind testator was held capable of acknowledging his signature to his will.

⁶ *Hudson v. Parker*, 1 Roberts. 24, per Dr. Lushington.

this rule been interpreted, that where a testator had acknowledged a paper to be his will in the presence of witnesses, but these persons had neither seen him sign it, nor seen his signature at the time of their subscription, a prayer for probate was rejected, though both the witnesses admitted that they had seen the testator writing the paper, and the will, when produced, actually bore his signature.¹

§ 1054. A somewhat less stringent construction has been put on that part of the Act which requires the witnesses to subscribe in the presence of the testator; and, although, if their signatures were not attached in the testator's room, proof would be required to show that he was in such a position as to have seen them write,² yet where the testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence, the will was admitted to probate.³ This distinction has been adopted in consequence of the vast difference which exists in the relative importance of the two acts, and in the objects they are intended to answer. The witnesses are to see the signature made or acknowledged, because they are subsequently to attest it; but they are to subscribe the will in the presence of the testator, chiefly for the purpose of formally completing it; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act, they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign.⁴ § 968

§ 1055. In enacting that the testator must "make or acknowledge" his signature in the presence of witnesses, the Legislature did not intend to confine the acknowledgment to cases where the § 969

¹ *Hudson v. Parker*, 1 Roberts. 14; *Blake v. Blake*, 51 L. J., P. & D. 36, per Ct. of App.; L. R., 7 Pr. D. 102, S. C. But see *Smith v. Smith*, 35 L. J., Pr. & Mat. 65; 1 Law Rep., P. & D. 143, S. C.

² *Norton v. Barrett*, Deane, Ec. R. 259. Ante, § 163.

³ *Newton v. Clarke*, 2 Curt. 320. But see *Tribe v. Tribe*, 7 Ec. & Mar. Cas. 132; 1 Roberts. 775, S. C.; In re Kellick, 34 L. J., Pr. & Mat. 2; S. C. nom. In re Killick, 3 Swab. & Trist. 578. Ante, § 163.

⁴ *Hudson v. Parker*, 1 Roberts. 35, 36, per Dr. Lushington.

signature was made "by some other person" than the testator, but meant it to apply equally to those cases where the signature had been previously made by himself.¹ In making the acknowledgment,² it is not necessary that the testator should actually point out to the witness his name, and say, "This is my name or my handwriting;" but if he states that the whole instrument was written by himself,³ or if he produces a paper as his will, and requests the witnesses to put their names *underneath his*,⁴ or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it,⁵ or even, it seems, if he shows a paper in his handwriting to the witnesses and desires, or allows a bystander to desire,⁶ them to sign it, without stating that such paper is his will,⁷ this will be a sufficient acknowledgment of his signature, provided it clearly appears that, at the time of making the statement or producing the document, the signature was really affixed, and was actually seen by the witnesses when they signed at the testator's request. Unless, however, the judge is satisfied that the witnesses, before they subscribed the will, either saw the testator sign it or saw his signature attached to it, he must pronounce against its validity; for the statute requires, not that the *will*, but that the *signature*, should be attested.⁸ It follows from this rule, that if the witnesses sign before the testator the will is void, though the testator immediately afterwards affixes his signa-

¹ In re Cornelius Ryan, 1 Curt. 908, recognised in *Ilott v. Genge*, 3 Curt. 174.

² The acknowledgment *may* be made by a blind testator, In re Mullen, I. R., 5 Eq. 309.

³ *Blake v. Knight*, 3 Curt. 563.

⁴ *Gaze v. Gaze*, 3 Curt. 451.

⁵ In re Davies, 2 Roberts. 377.

⁶ See *Faulds v. Jackson*, 6 Ec. & Mar. Cas. Supp. x., per Ld. Brougham; *Inglesant v. Inglesant*, 3 Law Rep., P. & D. 172; 43 L. J., Pr. & Mat. 43, S. C.

⁷ *Keigwin v. Keigwin*, 3 Curt. 607; In re Ashmore, *id.* 758, per Sir H. Fust; In re Bosanquet, 2 Roberts. 577; In re Dinmore, *id.* 641; In re Jones, Deane, Ec. R. 3.

⁸ *Hudson v. Parker*, 1 Roberts. 14; *Blake v. Blake*, 51 L. J., Ch. 377, per Ct. of App.; S. C. in Prob. Div., 51 L. J., P. & D., 37, per Ct. of App.; and L. R., 7 Pr. D. 102; *Ilott v. Genge*, 3 Curt. 175, 181; *Countess de Zichy Ferraris v. M. of Hertford*, 3 Curt. 479; In re Summers, 7 Ec. & Mar. Cas. 562; 2 Roberts. 295, S. C.; In re Pearsons, 33 L. J., Pr. & Mat. 177; *Fischer v. Popham*, 3 Law Rep., P. & D. 246; 44 L. J., Pr. & Mat. 47, S. C.

ture in their presence, and though they subsequently seal the document.¹

§ 1056. But it is not absolutely essential to the validity of a will that positive affirmative evidence should be given by the subscribing witnesses, that the testator either signed it, or acknowledged his signature to it, in their presence, since the court may *presume due execution* under the circumstances.² Thus, where, three years after the supposed execution, the witnesses deposed that they went to the house of the deceased, who, as writer to an attorney, was presumed to be conversant with business, to see him sign his will; that he then produced a paper, telling them that it was his will and in his handwriting; that he read over the attestation clause, and the introductory words, and pointed out a mistake which had been rectified in the body of the instrument; that he did not sign in their presence; that when they attested the paper no seal was upon it, but they could not positively swear that there was no signature; Sir Herbert Jenner Fust granted probate, though the will, when produced, was not only signed but sealed.³ So, also, if the will contains an attestation clause, and purports to be duly signed by the testator and two witnesses, the court will *prima facie* presume, in the absence or death of the witnesses, or in the event of their not remembering the facts attendant on the execution, that the statute has been complied with, and that *omnia ritè esse acta*.⁴ The same presumption has been recog- § 970

¹ In re Byrd, 3 Curt. 117; In re Olding, 2 id. 865; Cooper v. Bockett, 3 id. 648; 4 Moo. P. C. R. 419, S. C.; Burke v. Moore, I. R., 9 Eq. 609.

² See Doe v. Davies, 9 Q. B. 650, per Ld. Denman; ante, § 149.

³ Blake v. Knight, 3 Curt. 547, 562. See, also, Beckett v. Howe, 39 L. J., Pr. & Mat. 1; 2 Law Rep., P. & D. 1, S. C.; Olver v. Johns, 39 L. J., Pr. & Mat. 7; Kelly v. Keatinge, I. R., 5 Eq. 174; In re Janaway, 44 L. J., Pr. & Mat. 6.

⁴ Wright v. Sanderson, 53 L. J., P. D. & A. 49, nom. Re Sanderson, Wright v. Sanderson, S. C.; and L. R., 9 P. D. 149, per Ct. of App., Times, 28 Feb., 1884; Burgoyne v. Showler, 1 Roberts. 5, per Dr. Lushington; Hitch v. Wells, 10 Beav. 84; In re Leach, 6 Ec. & Mar. Cas. 92, per Sir H. Fust; Leech v. Bates, 1 Roberts. 714; In re Rees, 34 L. J., Pr. & Mat. 56; Brenchley v. Still, 2 Roberts. 162, 175—177; Thomson v. Hall, 2 id. 426; In re Holgate, 1 Swab. & Trist 261; Lloyd v. Roberts, 12 Moo. P. C. R. 158; Foot v. Stanton, Deane, Ec. R. 19; Reeves v. Lindsay, I. R., 3 Eq. 509; Vinnicombe v. Butler, 34 L. J., Pr. & Mat. 18; 3 Swab. & Trist. 580, S. C.; Smith v. Smith, 35 L. J., Pr. & Mat. 65; 1 Law Rep., P. & D. 143, S. C.; O'Meagher v. O'Meagher, 11 L. R.,

nised, even in cases where no attestation clause was attached to the will,¹ and where circumstances existed, which a non legal mind might well deem sufficiently suspicious to justify a very different inference.²

§ 1057. It was at one time thought, that the clause requiring the testator to sign "at the foot or end" of the testament would be satisfied, though the will itself were wholly written on the first side of a sheet of paper, and the attestation and signature were attached to the second, or even the third side.³ This sensible view of the law has constantly been entertained by the judges in Ireland;⁴ but unfortunately in England a far more strict construction was ultimately put upon the words of the Act, and the consequence was that very many wills, which unquestionably ought to have been admitted to proof, were refused probate, because the testator had inadvertently permitted a trifling blank space to be interposed between the final word of the instrument and his signature.⁵ The mischiefs caused by this most injudicious

Ir. 117. See *Croft v. Croft*, 4 Swab. & Trist. 10; and *Wright v. Rogers*, 38 L. J., Pr. & Mat. 67; 1 Law Rep., P. & D. 678, S. C.

¹ In *re Thomas*, 1 Swab. & Trist. 255, per Sir C. Cresswell; *Gwillim v. Gwillim*, 29 L. J., Pr. & Mat. 31; 3 Swab. & Trist. 200, S. C.; *Vinnicombe v. Butler*, 34 L. J., Pr. & Mat. 18; 3 Swab. & Trist. 580, S. C.

² *Trott v. Skidmore*, 3 Swab. & Trist. 12; In *re Huckvale*, 36 L. J., Pr. & Mat. 84; 1 Law Rep., P. & D. 375, S. C.; In *re Pearn*, 45 L. J., P. D. & A. 34; L. R., 1 P. D. 70, S. C. But see *Pearson v. Pearson*, 40 L. J., Pr. & Mat. 53; 2 Law Rep., P. & D. 451, S. C.

³ In *re Gore*, 3 Curt. 758; In *re Carver*, id. 29.

⁴ *Derinzy v. Turner*, 1 Ir. Eq. R., N. S. 341.

⁵ See *Smee v. Bryer*, 6 Moo. P. C. R. 404; 6 Ec. & Mar. Cas. 20, 406, and Suppl. xli. to same vol. S. C.; In *re Howell*, 6 Ec. & Mar. Cas. 555; In *re Corder*, id. 556; In *re Attridge*, id. 597. Where the testator signed the will between testimonium clause and certain words descriptive merely of the witnesses, probate was granted; In *re Cotton*, 6 Ec. & Mar. Cas. 307. See, also, In *re Beadle*, 1 Roberts. 749; 7 Ec. & Mar. Cas. 43, S. C.; In *re Standley*, 1 Roberts. 755; 7 Ec. & Mar. Cas. 69, S. C.; In *re Brown*, 1 Roberts. 710; In *re Banly*, id. 751; In *re Hellings*, id. 753; In *re Hearn*, 2 Roberts. 112; 7 Ec. & Mar. Cas. 266, S. C.; In *re Odell*, 7 Ec. & Mar. Cas. 267—271; In *re Batten*, id. 288; 2 Roberts. 124, S. C.; *Holbeck v. Holbeck*, 7 Ec. & Mar. Cas. 294; 2 Roberts. 126, S. C.; In *re Minty*, 7 Ec. & Mar. Cas. 374—378; cases collected, id. 543—552; In *re Hill*, 2 Roberts. 114; In *re White*, id. 194.

interpretation of the statute became at last so serious as to require the interference of the Legislature; and in 1852, Lord Chancellor St. Leonards, to his very great credit, obtained the assent of Parliament to an Act,¹ which, if it be not drawn by the hand of a master, has at least had the effect of remedying the principal evils that arose from the former law.

§ 1058. The first section of this Act,—after reciting that, under § 972 the statute 7 W. 4 & 1 V., c. 26, no will is valid unless it be “signed at the foot or end thereof by the testator, or by some person in his presence, and by his direction,”—goes on to enact, that “Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite² to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will,³ and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation,⁴ or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after,⁵ or under, or beside

¹ 15 & 16 V., c. 24.

² In re Williams, 35 L. J., Pr. & Mat. 2; 1 Law Rep., P. & D. 4, S. C.; In re Coombs, 36 L. J., Pr. & Mat. 25; 1 Law Rep., P. & D. 302, S. C.

³ See *Cook v. Lambert*, 32 L. J., Pr. & Mat. 93; 3 Swab. & Trist. 46, S. C.; where a signature written on a piece of paper, which had been previously wafered to the foot of the will, was held sufficient. See, also, In re Gausden, 2 Swab. & Trist. 362; In re Hammond, 3 id. 90; 32 L. J., Pr. & Mat. 200, S. C.; In re West, 32 L. J., Pr. & Mat. 182; In re Wright, 34 L. J., Pr. & Mat. 104; 4 Swab. & Trist. 35, S. C. But see In re M'Key, I. R., 11 Eq. 220.

⁴ In re Mann, 28 L. J., Pr. & Mat. 19; In re Casmore, 1 Law Rep., P. & D. 653; 38 L. J., Pr. & Mat. 54, S. C.

⁵ In re Puddephatt, 2 Law Rep., P. & D. 97; 39 L. J., Pr. & Mat. 84, S. C.; In re Jones, 46 L. J., P. D. & A. 80.

the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature,¹ or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written, to contain the signature;² and the enumeration of the above circumstances shall not restrict the generality of the above enactment;³ but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath⁴ or which follows it,⁵ nor shall it give effect to any disposition or direction inserted after the signature shall be made.”⁶

§ 1059. Although the testator for obvious reasons is required to sign the will “at the foot thereof,” it is somewhat remarkable that the Will Act points out no place for the signature of the witnesses. The most convenient, and therefore the most proper, place undoubtedly is under, or by the side of, the signature of the testator; but the selection of such a locality is by no means essential; and the testament has been deemed duly executed, even where the attestation clause and the signatures of the witnesses were indorsed upon it.⁷ The Court, however, in all these cases

¹ In re Archer, 2 Law Rep., P. & D. 252; 40 L. J., Pr. & Mat. 80, S. C.

² Hunt v. Hunt, 1 Law Rep., P. & D. 209; 35 L. J., Pr. & Mat. 135, S. C.; In re Rice, I. R., 5 Eq. 176.

³ See In re Wotton, 43 L. J., Pr. & Mat. 14; 3 Law Rep., P. & D. 159, S. C.

⁴ See In re Kimpton, 33 L. J., Pr. & Mat. 153, per Wilde, J. O.; 3 Swab. & Trist. 427, S. C.; In re Woodley, 3 Swab. & Trist. 429; In re Jones, 34 L. J., Pr. & Mat. 41; 4 Swab. & Trist. 1, S. C.; In re Powell, 34 L. J., Pr. & Mat. 107; 4 Swab. & Trist. 34, S. C.; In re Ainsworth, 2 Law Rep., P. & D. 151.

⁵ See Sweetland v. Sweetland, 4 Swab. & Trist. 6; In re Birt, 2 Law Rep., P. & D. 214; S. C. nom. In re Burt, 40 L. J., Pr. & Mat. 26; In re Dilkes, 3 Law Rep., P. & D. 166; 43 L. J., Pr. & Mat. 38, S. C.

⁶ These provisions apply to wills already made, see § 2.

⁷ In re Chamney, 7 Ec. & Mar. Cas. 70, 1 Roberts. 757, S. C. See In re Taylor, 2 Roberts. 411.

must be satisfied that the signatures, wherever placed, were really intended to attest the operative signature of the testator.¹

§ 1060. Under the Will Act of 1838, as under the Statute of Frauds, the testator may have his hand guided by another person,² or he may sign by his mark or initials only,³ though his name does not appear, or though a wrong name does by mistake appear,⁴ in the body of the will;⁵ and the attesting witnesses, whether they can write or not, may also sign as marksmen;⁶ and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other.⁷ It has even been held sufficient for witnesses to subscribe the will by their initials.⁸ In conformity also with the provisions in the Will Act that "no form of attestation shall be necessary," it has been held, that a mere subscription of two names, without any memorandum to show that the parties have subscribed as witnesses, will satisfy the requirements of the statute.⁹ Again, under either Act, any

¹ *Phipps v. Hale*, 3 Law Rep., B. & D. 166.

² *Wilson v. Beddard*, 12 Sim. 28.

³ *Baker v. Denning*, 8 A. & E. 94; 3 N. & P. 228, S. C.; In re Blewitt, 49 L. J., P. D. & A. 31; L. R., 5 P. D. 116, S. C. Where a testator has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name, id.; and no proof is required that the will was read over to him, *Clark v. Clark*, 1 R., 2 C. L. 395. Sealing a will is not a sufficient signing, *Smith v. Evans*, 1 Wils. 313; *Grayson v. Atkinson*, 2 Ves. Sen. 459.

⁴ In re Douce, 2 Swab. & Trist. 593; In re Clarke, 1 Swab. & Trist. 22.

⁵ In re Bryce, 2 Curt. 325.

⁶ In re Amiss, 2 Roberts. 116; *Clark v. Clark*, 3 L. R., Ir. 306; S. C. on App., 5 L. R., Ir. 57. But an attesting witness cannot subscribe a will in another person's name; *Pryor v. Pryor*, 29 L. J., Pr. & Mat. 114.

⁷ *Harrison v. Elvin*, 3 Q. B. 117; In re Lewis, 31 L. J., Pr. & Mat. 153; In re Frith, 57 L. J., Pr. & Mat. 6; 1 Swab. & Trist. 8, S. C.; *Lewis v. Lewis*, 2 Swab. & Trist. 153; *Roberts v. Phillips*, 4 E. & B. 450.

⁸ In re Christian, 7 Ec. & Mar. Cas. 265, per Sir H. Fust; 2 Roberts. 110, S. C.; In re Blewitt, 49 L. J., P. D. & A. 31; L. R., 5 P. D. 116, S. C. See In re Trevanion, 2 Roberts. 311; *Charlton v. Hindmarsh*, 1 Swab. & Trist. 433; S. C., 28 L. J., Pr. & Mat. 132; S. C. at Nisi Prius, 1 Fost. & Fin. 540; S. C. nom. *Hindmarsh v. Charlton*, 8 H. of L. Cas. 160, cited ante, § 1052, n. 3. See, too, In re Sperling, 33 L. J., Pr. & Mat. 25, where a witness, instead of signing his name, wrote "servant to M. S." and this was held sufficient; 3 Swab. & Trist. 272, S. C. But where an infirm witness, intending to sign his name, could only write "Saml." and omitted his surname, the signature was held to be insufficient; In re Maddock, 43 L. J., Pr. & Mat. 29; 3 Law Rep., P. & D. 169, S. C.

⁹ *Bryan v. White*, 2 Roberts. 315. See *Griffiths v. Griffiths*, 41 L. J., Pr. & Mat. 14; 2 Law Rep., P. & D. 300, S. C.

person, even though he be one of the two attesting witnesses, may write,¹ or even stamp,² the testator's signature by his direction; and where the drawer of a will, being requested by the testator to sign for him, put *his own* signature to the instrument, this was held to be sufficient, as the Act does not say that the signature must bear the testator's name.³ The witnesses, however, must attest the will, either by their signature or their marks, and probate has been refused when a stranger, at the request of the testator, had signed for one of the witnesses who was unable to write.⁴

§ 1061. It may be stated, with regard to the incorporation of papers in wills, that here, as in other documents, a paper imperfect in itself may, by *clear reference* to it as an *existing* document,⁵ be so identified with an instrument validly executed as to form part of it, and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured.⁶ Unattested wills and codicils have thus constantly been set up by

¹ *Smith v. Harris*, 1 Roberts. 262; *In re Bailey*, 1 Curt. 914.

² *Jenkins v. Gaisford*, 32 L. J., Pr. & Mat. 122; 3 Swab. & Trist. 93, S. C. See *Bennett v. Brumfitt*, 37 L. J., C. P. 25; 2 Law Rep., C. P. 28, S. C.; and ante, § 1029.

³ *In re Clark*, 2 Curt. 329. - See, also, *In re Blair*, 6 Ec. & Mar. Cas. 528.

⁴ *In re Cope*, 2 Roberts. 335; *In re Duggins*, 39 L. J., Pr. & Mat. 24.

⁵ *Singleton v. Tomlinson*, L. R., 3 App. Cas. 404, per H. L. (I.); S. C. in Ct. below, nom. *Watson v. Arundell*, 1 R., 11 Eq. 53; *In re Kehoe*, 13 L. R., Ir. 13; *Dickinson v. Stidolph*, 11 Com. B., N. S. 341; *Van Straubenzee v. Monck*, 32 L. J., Pr. & Mat. 21; 3 Swab. & Trist. 6, S. C.; *In re Greves*, 28 L. J., Pr. & Mat. 28; 1 Swab. & Trist. 256, S. C.; *Allen v. Maddock*, 11 Moo. P. C. R. 427; *In re Almosnino*, 29 L. J., P. & Mat. 46; 1 Swab. & Trist. 508, S. C.; *In re Brewis*, 33 L. J., Pr. & Mat. 124; 3 Swab. & Trist. 473, S. C.; *In re Luke*, 34 L. J., Pr. & Mat. 105; *In re Lady Truro*, 35 L. J., Pr. & Mat. 89; 1 Law Rep., P. & D. 201, S. C.; *In re Sunderland*, 35 L. J., Pr. & Mat. 82; 1 Law Rep., P. & D. 198, S. C.; *In re Watkins*, 35 L. J., Pr. & Mat. 14; 1 Law Rep., P. & D. 19, S. C.; *In re Dallow*, 35 L. J., Pr. & Mat. 81; 1 Law Rep., P. & D. 189, S. C. See post, § 1195, ad fin.

⁶ *Countess de Zichy Ferraris v. M. of Hertford*, 3 Curt. 493, per Sir H. Fust; *In re Lady Durham*, id. 57; *In re Dickins*, id. 60; *In re Willerford*, id. 77; *Habergham v. Vincent*, 2 Ves. 204; *In re Edwards*, 6 Ec. & Mar. Cas. 306; *In re Ash, Deane*, Ec. R. 181; *In re Lady Pembroke*, id. 182; *In re Stewart*, 3 Swab. & Trist. 192; 4 Swab. & Trist. 211. See ante, § 1026.

subsequent attested codicils which have confirmed them.¹ Where, however, a testator at the foot of a valid will of 1833 made two codicils prior to the 1st of January, 1838, and five more after that date, the whole seven being unattested, and then in 1847 duly executed an eighth codicil on a separate paper, which he described as "a codicil to his *will*," the court held that the five unattested codicils, which bore date after the passing of the Will Act, were not rendered valid by the eighth codicil, as they formed no part of the testator's will, legally and technically speaking.²

§ 1062. With respect to § 11, which excepts from the operation of the Act all wills of personal estate made by "any soldier being in actual military service, or any mariner or seaman being at sea," it has been determined, first, that the word "soldier" includes all officers and soldiers, who have been in the employ of the East India Company, as well as those in her Majesty's service;³ secondly, that the privilege, as to soldiers, is confined to such as are actually *on an expedition*;⁴ and, consequently, that officers quartered with their regiments in barracks, or otherwise forming part of a stationary force, whether at home or in the colonies, are not within the exception;⁵ thirdly, that the Act applies to seamen in the merchant, as well as in the Queen's, service,⁶ and that the purser of a man-of-war⁷ and a surgeon in the navy⁸ are both in-

¹ *Aaron v. Aaron*, 3 De Gex & Sm. 475; *Utterton v. Robins*, 1 A. & E. 423; *Gordon v. Ld. Reay*, 5 Sim. 274; *Doe v. Evans*, 1 C. & M. 42; 3 Tyr. 56, S. C.; *Allen v. Maddock*, 11 Moo. P. C. R., 427. In goods of Heathcote, L. R., 6 P. D. 30; 50 L. J., P. D. & A. 42, S. C. See *In re Allnutt*, 33 L. J., Pr. & Mat. 86; *Anderson v. Anderson*, 41 L. J., Ch. 247; 13 Law Rep., Eq. 381, S. C.; and especially, *Burton v. Newbery*, L. R., 1 Ch. D. 234, per Jessel, M. R.; 45 L. J., Ch. 202, S. C.; and *Green v. Tribe*, L. R., 9 Ch. D. 231, per Fry, J.; 47 L. J., Ch. 783, S. C., nom. *In re Love*.

² *Haynes v. Hill*, 7 Ec. & Mar. Cas. 256. See, also, *Johnson v. Ball*, 5 De Gex & Sm. 85; *In re Drummond*, 2 Swab. & Trist. 8; *In re Tovey*, 47 L. J., Pr. 63; *Stockil v. Punshon*, 50 L. J., Pr. 14; *In re Mathias*, 32 L. J., Pr. 63; *Stockil v. Punshon*, 50 L. J., Pr. 14; *In re Mathias*, 32 L. J., Pr. & Mat. 115; 3 Swab. & Trist. 100, S. C.; *In re Wyatt*, 2 Swab. & Trist. 494; 31 L. J., Pr. & Mat. 197, S. C.; *In re Lady Truro*, 35 L. J., Pr. & Mat. 89; *In re Hall*, 2 Law Rep., P. & D. 256.

³ *Shearman v. Pyke*, cited 3 Curt. 539—542.

⁴ See *Herbert v. Herbert*, Deane, Ec. R. 10.

⁵ *Drummond v. Parish*, 3 Curt. 522, 542; *In re Hill*, 1 Roberts, 276; *White v. Repton*, 3 Curt. 818; *Bowles v. Jackson*, 1 Ec. & Mar. Cas. 294.

⁶ *In re Milligan*, 2 Roberts, 103.

⁷ *In re Hayes*, 9 Curt. 338.

⁸ *In re Saunders*, 35 L. J., Pr. & Mat. 26; 1 Law Rep., P. & D. 16, S. C.

cluded in the term "seamen;" fourthly, that the exception extends to an invalided seaman, who is returning home from foreign service in a passenger ship,¹ and also to a naval captain on board a Queen's ship in a river, provided he be actually engaged in a naval expedition;² but lastly, that it does not extend to an admiral in command of a fleet in the colonies, who lives with his family on shore at his official residence.³ It has further been held, with respect to soldiers' wills, that material alterations contained in them, may, in the absence of evidence, be presumed to have been made while the respective testators were employed in actual military service.⁴

§ 1062A. When the Will Act first came into operation, it was held to apply to the testamentary papers of all domiciled Englishmen excepting those specified in the last section, even when such papers were executed in foreign countries;⁵ but this law being found in practice productive of injustice, the Legislature interfered in 1861, and applied a remedy for the evil by passing the Act of 24 & 25 V. c. 114. Section 1 of that statute enacts, in substance, that every will made out of the United Kingdom by a British subject, whatever his domicile may be, shall, as regards personal estate, be entitled to probate, if made according to the forms required either by the law of the place where it was made, or by the law of the place where the testator was domiciled.⁶

§ 1063. The Will Act further provides, with respect to re- § 980
vocation, "that every will made by a man or woman shall be *revoked* by his or her *marriage*, except a will made in exercise of a power of appointment, when the real or personal estate

¹ In re Saunders, 35 L. J., Pr. & Mat. 26; 1 Law Rep., P. & D. 16, S. C.

² In re Admiral Austen, 3 Roberts, 611; In re M'Murdo, 37 L. J., Pr. & Mat. 14; 1 Law Rep., P. & D. 540, S. C., where the exception was held to apply to a mate, who was on board a ship permanently stationed in Portsmouth Harbour.

³ *Ld. Euston v. Ld. H. Seymour*, cited 2 Curt. 339, and recognised in *Drummond v. Parish*, 3 Curt. 530.

⁴ In re Tweedale, 3 Law Rep., P. & D. 204.

⁵ *Croker v. M. of Hertford*, 4 Moo. P. C. R. 339.

⁶ This enactment will not apply to a testamentary exercise of a power, *Re Kirwan's Trusts*, L. R., 25 Ch. D. 373. Neither will the enactment apply to an alien, whose domicile of origin was English, but who died domiciled in Germany, having made a will according to the English form. *Blöxam v. Favre*, L. R., 9 P. D. 130, per Ct. of App.

thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled, as his or her next of kin, under the Statute of Distribution;"¹ and "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances;"² and "that no will, or codicil,³ or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required,⁴ or by some writing declaring an intention to revoke the same,⁵ and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."⁶ Where a testator had destroyed his will on the supposition that he had substituted another for it, but the latter instrument turned out to be invalid as not being duly executed, the court held that a copy of the first will was entitled to probate.⁷ With respect to the *re-execution* of a will, in which alterations have been made, it cannot be too well understood that a tracing by a testator with a dry pen over his former signature in the presence of witnesses cannot be regarded as equivalent to a re-signature.⁸

¹ 7 W. 4 & 1 V., c. 26, § 18. See *In re Sir C. Fitzroy*, 1 Swab. & Trist. 133; *Re M'Vicar*, 1 Law Rep., P. & D. 671.

² § 19. Or by any change of domicile, 24 & 25 V., c. 114, § 3.

³ *In re Turner*, 2 Law Rep., P. & D. 403. See *ante*, § 165.

⁴ *Ante*, § 1050.

⁵ *De Pontès v. Kendall*, 31 L. J., Ch. 185, per Romilly, M. R. See *In re Hicks*, 38 L. J., Pr. & Mat. 65; 1 Law Rep., P. & D. 683, S. C.; *In re Fraser*, 2 Law Rep., P. & D. 40; 39 L. J., Pr. & Mat. 20, S. C.; *In re Durance*, 2 Law Rep., P. & D. 406; 41 L. J., Pr. & Mat. 60, S. C. A verbal authority, given by a Hindu testator to another person to destroy his will, will revoke the instrument, even though it be not destroyed; *Maharajah Pertab Narain Singh v. Maharanee Subhao Kooer*, L. R., 4 Ind. App. 228.

⁶ § 20.

⁷ *Scott v. Scott*, 1 Swab. & Trist. 258; *Clarkson v. Clarkson*, 31 L. J., Pr. & Mat. 143; 2 Swab. & Trist. 497, S. C.; *Giles v. Warren*, 2 Law Rep., P. & D. 401; 41 L. J., Pr. & Mat. 59, S. C.; *Dancer v. Crabb*, 42 L. J., Pr. & Mat. 53; 3 Law Rep., P. & D. 98, S. C.; *Powell v. Powell*, 35 L. J., Pr. & Mat. 100; 1 Law Rep., P. & D. 209, S. C.; overruling *Dickinson v. Swatman*, 30 L. J., Pr. & Mat. 84; 4 Swab. & Trist. 205, S. C. See *Eckersley v. Platt*, 1 Law Rep., P. & D. 281; *Re Weston*, 1 Law Rep., P. & D. 633; 38 L. J., Pr. & Mat. 53, S. C.; and *post*, § 1070.

⁸ *In re Cunningham*, 29 L. J., Pr. & Mat. 71; 4 Swab. & Trist, 194, S. C.

§ 1064. In order to revoke a former will by a later one, no § 981
 revocation clause is necessary; but any paper duly executed, by
 which the testator disposes of his *whole* property, is,—except
 under very special circumstances,¹—a revocation in toto of
 all previous wills. This doctrine has been held applicable, even
 where the last testamentary paper contained no appointment
 of executors;² and in one case, where a testator by his “*last*
will,” in which executors were appointed, disposed of *part* of
 his personalty, a former will was held to be revoked, though it
 contained provisions not wholly inconsistent with the later in-
 strument.³ Little, if any, weight however can now be attached to
 this decision; for, in the first place, it appears clear that the
 phrase “*last will*” will simply be regarded as one of form;⁴ and
 next, it must be borne in mind that, according to a maxim which
 has received the solemn sanction of the Court of last resort, a
 former will cannot be revoked by one of later date, unless the later
 instrument contains a clause of express revocation, or unless the
 two wills are incapable of standing together.⁵ The onus of esta-
 blishing the revocation lies on the party who impeaches the first
 will; and no inference in his favour can be drawn from the mere
 fact that the later instrument contains equivocal expressions, or that
 the legacies bequeathed by it are *partially* inconsistent with prior
 testamentary dispositions.⁶ Still, if the two documents taken to-

¹ See *O’Leary v. Douglass*, 1 L. R. Ir., Ch. D. 45.

² *Henfrey v. Henfrey*, 4 Moo. P. C. R. 29; 2 Curt. 468, S. C., in court below.

³ *Plenty v. West*, 1 Roberts. 264. See, also, S. C. in Ch., before Romilly, M. R., 22 L. J., Ch. 185.

⁴ *Stoddart v. Grant*, 1 Macq. Sc. Cas., H. of L. 171, per Ld. Truro; *Freeman v. Freeman*, 5 De Gex, M. & G. 704.

⁵ *Stoddart v. Grant*, 1 Macq. Sc. Cas., H. of L. 163. See *Williams v. Williams*, L. R., 8 Ch. D. 789, per Ct. of App.; 47 L. J., Ch. 857, S. C.; In re *Graham*, 32 L. J., Pr. & Mat. 113; 3 Swab. & Trist. 69, S. C.; *Dempsey v. Lawson*, L. R., 2 P. D. 98; 46 L. J., P. D. & A. 23, S. C.; *Shiel v. O’Brien*, I. R., 7 Eq. 64; *Leslie v. Leslie*, I. R.; 6 Eq. 332; *Lemage v. Goodban*, 35 L. J., Pr. & Mat. 28; 1 Law Rep., P. & D. 57, S. C.; In re *Fenwick*, 1 Law Rep., P. & D. 319; *Geaves v. Price*, 32 L. J., Pr. & Mat. 113; 3 Swab. & Trist. 71, S. C.; *Birks v. Birks*, 34 L. J., Pr. & Mat. 90; 4 Swab. & Trist. 23, S. C.; In re *Petchell*, 43 L. J., Pr. & Mat. 22. In re *M’Farlane*, 13 L. R. Ir. 264.

⁶ *Id.* See, also, *Doe d. Hearle v. Hicks*, 1 Cl. & Fin. 20; *Wallace v. Seymour*, I. R., 6 C. L. 196, 219, and 313; *Doe v. Ward*, 18 Q. B. 197; *Williams v. Evans*, 1 E. & B. 727; *Freeman v. Freeman*, 23 L. J., Ch. 838; 1 Kay,

gether would dispose of property far larger than that possessed by the testator, that fact in itself would raise a fair inference that the first was intended to be revoked by the second;¹ and indeed, in every inquiry of this nature, if any real ambiguity can be shown to exist respecting the testator's intentions, recourse may be had to parol evidence to clear up the doubt.²

§ 1065. Where a jury found that a second will, which was not produced, contained a different disposition of real estate from a former one, "but in what particulars is unknown," the House of Lords, on writ of error, decided that the first will was not revoked, so as to let in the title of the heir at law.³ In another case, where a testator, many years after making a will of personal property, executed another paper, which was proved to have commenced with the words "This is the last will and testament," but its further contents were utterly unknown, and after the testator's death it was not forthcoming, the judicial committee of the Privy Council held that the prior will remained unrevoked, and was entitled to probate.⁴ A general clause in a will revoking all former wills, does not of itself necessarily operate to revoke a will made in execution of a power;⁵ though it will be held to have that effect, unless such a result can be shown to be utterly unreasonable.⁶ It would seem that the re-execution of a will, even though it contain a clause of revocation, will not in general be deemed to have revoked any of its codicils; for, unless the contrary appear to have been the intention of the testator, the Probate Division of the High

479; 5 De Gex, M. & G. 704, S. C.; *Barclay v. Maskelyne*, 28 L. J., Ch. 115; 1 V. John. 124, S. C.; *Robertson v. Powell*, 2 H. & C. 762; 33 L. J., Ex. 34, S. C.; *Pilsworth v. Mosse*, 14 Ir. Eq. R., N. S. 163.

¹ *Jenner v. Finch*, 49 L. J., P. D. & A. 25, 27, per Sir J. Hannen; L. R., 5 P. D. 106, S. C.

² *Id.*

³ *Goodright v. Harwood*, 2 Wm. Bl. 937; 3 Wils. 497, S. C. See *Thomas v. Evans*, 2 East, 488; *Brown v. Brown*, 8 E. & B. 876; *Dickinson v. Stidolph*, 11 Com. B., N. S. 341, 357; *In re Brown*, 1 Swab. & Trist. 32.

⁴ *Cutto v. Gilbert*, 9 Moo. P. C. R. 131.

⁵ *In re Merritt*, 1 Swab. & Trist. 112.

⁶ *Sotheran v. Denning*, L. R., 20 Ch. D. 99, per Ct. of App.

Court will hold, that all the codicils have been republished by the re-execution of the principal instrument.¹

§ 1066. With respect to the revocation of a will by its destruction, it should be observed that a testator cannot revoke his will by authorising any person to destroy it *out of his presence*; and it follows as a corollary from this proposition, that he has no power to make his will contingent, by giving authority even by the will itself to any person to destroy it after his death.² § 982

§ 1067. It is difficult to fix *à priori* what extent of *burning* or *tearing* will amount to the revocation of a will. It is clear that the revocation will not be complete, unless the act of spoliation be deliberately done upon the instrument, in the belief that it is a valid will,³ and *animo revocandi*.⁴ This is expressly rendered necessary by the Wills Act,⁵ and was impliedly required by the statute of Charles.⁶ It is further clear, that the burthen of showing that a once valid will has been revoked by mutilation, will lie upon the party who sets up the revocation of the instrument.⁷ Moreover, it seems plain, on general principle, that the declarations of the testator, accompanying the act of spoliation,—unlike those which he may subsequently make,⁸—will be admissible in evidence as explanatory of his intention.⁹ Still the question remains, Must there be a total or substantial burning or tearing of the writing itself, or will the revocation be complete, if the testator, intending § 983

¹ *Wade v. Nazer*, 6 Ec. & Mar. Cas. 46. See *In re De la Saussaye*, 3 Law Rep., P. & D. 42; 42 L. J., Pr. & Mat. 47, S. C.

² *Stockwell v. Ritherdon*, 6 Ec. & Mar. Cas. 409, 414, per Sir H. Fust.

³ *Giles v. Warren*, 2 Law Rep., P. & D. 401; 41 L. J., Pr. & Mat. 59, S. C.

⁴ See *In re Cockayne*, Deane, Ec. R. 177.

⁵ Ante, § 1063.

⁶ *Bibb v. Thomas*, 2 W. Bl. 1044.

⁷ *Harris v. Berrall*, 1 Swab. & Trist. 153; *Benson v. Benson*, 40 L. J., Pr. & Mat. 1; 2 Law Rep., P. & D. 172, S. C.

⁸ *Staines v. Stewart*, 31 L. J., Pr. & Mat. 10; 2 Swab. & Trist. 320, S. C. But see *In re Harris*, *Cheese v. Lovejoy*, 46 L. J., P. D. & A. 66, per Sir R. Phillimore; L. R., 2 P. D. 251, S. C., nom. *Cheese v. Lovejoy*, per Ct. of App.

⁹ *Dan v. Brown*, 4 Cowen, 490; *Clarke v. Scripps*, 2 Roberts, 568.

to revoke, tears or burns a portion of the paper on which the will is written, but does not destroy or deface any part of the writing?¹ In an old case, where the testator, having given the will "something of a rip with his hands, and having torn it so as almost to tear a bit off," rumpled it up and threw it into the fire, but a bystander saved it without his knowledge, before, as it seems, it was at all burnt, the court held that the revocation was complete.² However, it has since been doubted whether the proof given in that case was sufficient to satisfy the statute;³ and where a testator, being angry with the devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards he fitted together, and put by, the several pieces, saying he was glad it was no worse; the court refused to disturb a verdict by which the jury had found that the act of cancellation was incomplete, as the testator, had he not been stopped, would have gone further in the process of destruction.⁴

§ 1068. The *cutting* out the signature by the testator has been held to effect a revocation of the will, if not under the word "tearing," at least under the terms "or otherwise destroying the same."⁵ Even the act of tearing off the *seal* from a will, which had needlessly been executed as a sealed instrument, has been deemed sufficient both in England and in America to destroy the will in its entirety, and to effect its revocation.⁶ Where, however, a will was found in a mutilated state, being both torn and cut, but the signatures of the testator and the attesting witnesses remained uninjured, the court, guided by the peculiar nature of the mutilations, held, in the absence of any extrinsic evidence, that the instrument was not revoked.⁷

¹ See *Doe v. Harris*, 6 A. & E. 215—218; 1 N. & P. 405, S. C.

² *Bibb v. Thomas*, 2 W. Bl. 1043.

³ *Doe v. Harris*, 6 A. & E. 215, per *Ld. Denman*.

⁴ *Doe v. Perkes*, 3 B. & A. 489; *Elms v. Elms*, 27 L. J., Pr. & Mat. 96; 1 Swab. & Trist. 155, S. C.

⁵ *Hobbs v. Knight*, 1 Curt. 768; *Evans v. Dallow*, 31 L. J., Pr. & Mat. 128. See ante, § 165.

⁶ *Price v. Powell*, 3 H. & N. 341; S. C. nom. *Price v. Price*, 27 L. J., Ex. 409; *Avery v. Pixley*, 4 Mass. 462. See also *Williams v. Tyley*, 1 V. John. 530; In re *Harris*, 33 L. J., Pr. & Mat. 181; 3 Swab. & Trist. 485, S. C.

⁷ *Clarke v. Scripps*, 2 Roberts. 563, per Sir J. Dodson; In re *Woodward*, (3787)

§ 1069. The Act of Victoria,—unlike the Statute of Frauds,— § 984 omits all mention of “*cancelling*” as one of the modes of revoking a will;¹ and with respect to *obliterating*, it enacts, in § 21, “that no obliteration, or interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be *apparent*, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will;² but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near to such alteration,³ or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end⁴ or some other part of the will.” The word “*apparent*” here used, does not mean what is capable of being made apparent by extrinsic evidence, but simply applies to what is apparent on the face of the instrument; and consequently, if a testator entirely obliterates any part of the will, *animo revocandi*, this must still operate as a revocation of that part, and no evidence dehors the will can be received, in order to show how the defaced passage originally stood.⁵ So, where a testator had covered a bequest in his will by pasting a piece of paper over it, the Court declined to order the removal of the paper, but granted probate of the will with the covered part in blank.⁶ So, the erasure by the testator of his own signature, or of the signature of either or both of the witnesses, if done *animo revocandi*, would amount to a revocation of the whole will, and would in fact be tantamount to its actual destruction.⁷ It has already been shown while treating of

2 Law Rep., P. & D. 206; 40 L. J., Pr. & Mat. 17, S. C.; In re Wheeler 49 L. J., P. D. & A. 29.

¹ See In re Brewster, 29 L. J., Pr. & Mat. 69; In re Harris, Cheese v. Lovejoy, 46 L. J., P. D. & A. 66, per Sir R. Phillimore; L. R., 2 P. D. 251, S. C., nom. Cheese v. Lovejoy, per Ct. of App.

² See ante, § 1050. See, also, Shearn, in goods of, 50 L. J., Pr. 15.

³ In re Wilkinson, L. R., 6 P. D. 100.

⁴ See In re Treeby, 3 Law Rep., P. & D. 342; 44 L. J., Pr. & Mat. 44 S. C.

⁵ Townley v. Watson, 3 Curt. 761, 764, 768, 769; 3 Ec. & Mar. Cas. 17, S. C.; In re McCabe, 42 L. J., Pr. & Mat. 79; 3 Law Rep., P. & D. 94, S. C.

⁶ Re Horsford, 44 L. J., Pr. & Mat. 9; 3 Law Rep., P. & D. 211, S. C. See post, § 1071, n. 3.

⁷ Hobbs v. Knight, 1 Curt. 780, 781, per Sir H. Fust; Evans v. Dallow, 31 (3788)

the law of presumptions,¹ that, in the absence of any direct evidence, the law will presume that any alteration or erasure in a will was made after its execution ; and, consequently, the courts will grant a probate of the will in its original form.²

§ 1070. It has further been determined, notwithstanding the language of § 34,³ that the provisions of the Will Act, with respect to the revocation or alteration of wills, apply equally to all wills, whether executed before or after the 1st of January, 1838, provided the act of assumed revocation has been done, or the alteration has been made, after that date.⁴ Although § 21, cited above,⁵ does not expressly state, that to effect a revocation of the will or any part of it, the erasure or obliteration must be made with that *intention*, yet the court has held that here, as under the Statute of Frauds, the animus revocandi is indispensable; and therefore, where a testator had erased the amount of a legacy, and had inserted a smaller sum, but the alteration took no effect, as it had not been duly executed, the court decreed probate of the will in its original form, since it was clear that the testator intended only a *substitution*, and not a revocation, of the bequest altered.⁶ What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another

L. J., Pr. & Mat. 128. See, also, *In re Harris*, 33 L. J., Pr. & Mat. 181; 3 Swab. Trist. 485, S. C.

¹ Ante, § 164.

² *Cooper v. Bockett*, 4 Moo. P. C. R. 419; 4 Ec. & Mar. Cas. 685, S. C.; *Greville v. Tylee*, 7 Moo. P. C. R. 320.

³ See ante, § 1050.

⁴ *Hobbs v. Knight*, 1 Curt. 768, 774—776; *Countess de Zichy Ferraris v. M. of Hertford*, 3 Curt. 468; *Brooke v. Kent*, 3 Moo. P. C. R. 334; 2 Curt. 343, S. C. nom. *In re Brooke*; *Croker v. M. of Hertford*, 4 Moo. P. C. R. 339; *Andrews v. Turner*, 3 Q. B. 177.

⁵ Ante, § 1069.

⁶ *Brooke v. Kent*, 3 Moo. P. C. R. 334, 349, 350; *Burtenshaw v. Gilbert*, 1 Cowp. 52, per Ld. Mansfield; *Onions v. Tyrer*, 1 P. Wms. 343; *In re Nelson*, I. R., 6 Eq. 569; *In re Cockayne*, Deane, Ec. R. 177; *In re Parr*, 29 L. J., Pr. & Mat. 70; *In re Harris*, id. 79; 1 Swab. & Trist. 536, S. C.; *In re Middleton*, 34 L. J., Pr. & Mat. 16; 3 Swab. & Trist. 583, S. C.; *In re M'Cabe*, 42 L. J., Pr. & Mat. 79; 3 Law Rep., P. D. 94, S. C.

gift in its place. If the latter branch of his intention cannot be effected, no sufficient reason exists for believing that he meant to vary the former gift at all,¹ and the erasure is treated as an act done by mere mistake, *sine animo cancellandi*.²

§ 1071. When this doctrine of dependent relative revocation becomes applicable, the court will have recourse to any means of legal proof by which to ascertain the disposition of the testator. In a case, therefore, in which a testator, with the view of varying the amount of a legacy, had pasted a piece of paper over the sum bequeathed, and had inserted thereon another figure, the court ordered the removal of this paper, and then gave effect to the will as originally framed.³

§ 1072. With respect to the *revival* of wills, the statute of Victoria enacts, that “no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise ‘than by the re-execution thereof, or by a codicil executed in manner herein-before required, and showing an intention to revive the same;’⁵ and when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.”⁶ By virtue of this enactment a conditional will, which has become invalid in consequence of the condition not having been performed, cannot now be established by any evidence of “ad-

¹ See *Rawlins v. Rickards*, 28 Beav. 370; *Ibbot v. Bell*, 34 Beav. 395; *Quinn v. Butler*, 6 Law Rep., Eq. 225.

² *Locke v. James*, 11 M. & W. 901, 910, 911, per Parke, B. See *Tupper v. Tupper*, 1 Kay & J., 665; and ante, § 1063, ad fin.

³ *Re Horsford*, 44 L. J., Pr. & Mat. 9; 3 Law Rep., P. & D. 211, S. C. See ante, § 1069, n. 6.

⁴ See ante, § 165.

⁵ See *In re Harker*, 7 Ec. & Mar. Cas. 44; *Marsh v. Marsh*, 30 L. J., Pr. & Mat. 77; *Rogers v. Goodenough*, 2 Swab. & Trist. 342; 31 L. J., Pr. & Mat. 49, S. C.; *In re May*, 37 L. J., Pr. & Mat. 68; 1 Law Rep., P. & D. 575, S. C. nom. *In re Steele*, May & Wilson; *In re Bryan Reynolds*, 42 L. J., Pr. & Mat. 20; S. C. nom. *In re Reynolds*, 3 Law Rep., P. & D. 35.

⁶ 7 W. 4 & 1 V., c. 26, § 22. See *Andrews v. Turner*, 3 Q. B. 177.

herence;"¹ neither can the will of a married woman, once void as having been made without the consent of her husband, be subsequently set up by any parol recognition after the husband's death.² Again, the destruction of the revoking instrument is no longer sufficient to revive a former will;³ and the question of revival or non-revival from this cause,—which under the old system was made to depend on the intention of the testator, as gathered from the circumstances of each particular case,⁴—can never again arise, excepting in the possible event of a second will having been revoked before Jan. 1st, 1838.

§ 1073. The next important statute, to which it is necessary to refer, is the one generally known as Lord Tenterden's Act.⁵ The first section, which has already been set out and partially discussed in the Chapter *On Admissions*,⁶ provides generally,—when read in connexion with § 13 of the Mercantile Marine Act,⁷ 1856,—that in actions grounded on simple contract, no case shall be taken out of the Statute of Limitations, except by *acknowledgment* or *promise in writing* to be *signed by the party chargeable thereby*, or by his authorised agent, or by part payment.⁸ Considering the endless variety of language in which acknowledgments of debts may be couched, it is obviously impossible to lay down distinct rules of interpretation, by following which the court⁹ will be enabled to arrive at a sound decision in each particular case. Much must, under any

¹ *Roberts v. Roberts*, 2 Swab. & Trist. 337; 31 L. J., Pr. Mat. & A. 46, S. C.

² *Id.* 339, per Sir C. Cresswell. See, also, *Noble v. Willock & Phelps*, 40 L. J., Pr. & Mat. 60; 2 Law Rep., P. & D. 276, S. C. nom. *Noble v. Phelps & Willock*; and *Noble v. Willock*, 42 L. J., Ch. 681; 8 Law Rep., Ch. App. 778, S. C.; and S. C. in Dom. Proc., nom. *Willock v. Noble*, 44 L. J., Ch. 345; 7 Law Rep., H. L. 580, S. C.

³ *Major v. Williams*, 3 Curt. 432; *Brown v. Brown*, 4 Jur., N. S. 163, Q. B.; & E. & B. 876, S. C.; In re *Brown*, 30 Law Times, 353, Ct. of Prob.; 1 Swab. & Trist. 32, S. C.; *Wood v. Wood*, 1 Law Rep., P. & D. 309.

⁴ *James v. Cohen*, 3 Curt. 782, per Sir H. Fust, citing *Usticke v. Bawden*, 2 Add. 125. ⁵ 9 G. 3, c. 14. ⁶ Ante, § 744. See, also, § 600.

⁷ 19 & 20 V., c. 97, § 13, cited ante, § 745.

⁸ The same law prevails in Ireland; 16 & 17 V., c. 113, § 24, as amended by 19 & 20 V., c. 97, § 13. See *Archer v. Leonard*, 15 Ir. Eq. R., N. S. 267; *Leland v. Murphy*, 16 id. 500.

⁹ That this is a question for the court, and not for the jury, see ante, § 43.

circumstances, be left to discretion; yet still that discretion may be materially guided by attending to the following propositions, which appear to be warranted by the most trustworthy decisions.

§ 1074. First, the Legislature, in passing the Act, did not intend to alter the legal construction to be put upon acknowledgments or promises made by defendants, but merely required a different mode of proof; substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses.¹ The inquiry, therefore, whether in a given case the written document amounts to an acknowledgment or promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation.² Secondly, in order to take a case out of the operation of the statute, the written and signed acknowledgment must amount either to an express promise to pay the debt, or to a clear and *unqualified* admission of a still subsisting liability, from which a promise to pay *on request* will be implied by law.³ The insertion, therefore, of a debt in the statement of assets and debts, made under the bankrupt law by a debtor whose affairs are in course of arrangement, will not be deemed a sufficient acknowledgment, as it simply amounts to an admission of a debt, which is to be paid in part or in some qualified mode.⁴ Thirdly, a

¹ See *Spollan v. Magan*, 1 Ir. Law. R., N. S. 700, per Monahan, C. J.

² *Haydon v. Williams*, 7 Bing. 166, 167, per Tindal, C. J.; 4 M. & P. 811, S. C.

³ *Morrell v. Frith*, 3 M. & W. 405, per Parke, B.; *Bucket v. Church*, 9 C. & P. 212, per id.; *Tanner v. Smart*, 6 B. & C. 609, per Ld. Tenterden; *Smith v. Thorne*, 21 L. J., Q. B. 199; 18 Q. B. 134, S. C.; *Everett v. Robertson*, 28 L. J., Q. B. 23; 1 E. & E. 16, S. C.; *Francis v. Hawkesley*, 28 L. J., Q. B. 370; 1 E. & E. 1052, S. C.; *Goate v. Goate*, 1 H. & N. 29; *Brigstocke v. Smith*, 1 C. & M. 486, per Bayley, J.; *Hart v. Prendergast*, 14 M. & W. 741, 745, 746. In this case *Alderson, B.*, questioned *Gardner v. M'Mahon*, 3 Q. B. 561; 2 G. & D. 593, S. C. In *Prance v. Sympton*, 1 Kay, 678, Wood, V.-C., held that the statute was ousted by a written acknowledgment that an account was pending coupled with a promise to pay the balance, if any should be found due from the writer. See *Hughes v. Paramore*, 24 L. J., Ch. 681; 7 De Gex, M. & G. 229, S. C.; *Crawford v. Crawford*, 1 R., 2 Eq. 166; In re *River Steamer Co.*, *Mitchell's Claim*, 6 Law Rep., Ch. App. 822.

⁴ See *Topping ex parte*, In re *Levey & Robson*, 34 L. J., Bk. 44, per Ld. Cranworth, C.

conditional promise, in the absence of proof of the fulfilment of the condition, will not suffice; but if such proof be afforded, the promise, whether express or implied, will be converted into an absolute one, and as such will support a statement of claim, averring a promise to pay on request.¹ In the case of a conditional promise the statute begins to run, not from the date of the promise, but from the time when the condition is fulfilled.²

§ 1075. Fourthly, since a mere acknowledgment of a debt, which § 988 does not amount in law to an implied promise to pay, will not take the case out of the Statute of Limitations, it would seem on principle to follow,—though several authorities throw much doubt on the subject,³—that an admission to a *stranger* that a sum is due will not suffice;⁴ but the question is still undecided, whether an acknowledgment by the maker of a promissory note to the payee, of the existence of a debt due thereon, can be made available to defeat the Statute of Limitations by a subsequent holder of the note, as amounting to a promise to pay the note according to its tenor and effect, that is, to the payee or his order.⁵ Fifthly, a general written promise to pay, not specifying any amount, or an absolute admis-

¹ *Humphreys v. Jones*, 14 M. & W. 1, 3; *Hart Prendergast*, id. 745, 746.

² *Walters v. E. of Thanet*, 2 Q. B. 757; *Maunsell v. Hedger*, 2 Ir. Law R., N. S. 88; *Hammond v. Smith*, 33 Beav. 452.

³ See *Clark v. Hooper*, 10 Bing. 481, per Tindal, C. J., and Park, J.; 4 M. & Sc. 353, S. C.; *Eicke v. Nokes*, 1 M. & Rob. 359, per Tindal, C. J.; *Peters v. Brown*, 4 Esp. 46, per Ld. Kenyon; *Smith v. Poole*, 12 Sim. 17; *Spollan v. Magan*, 1 Ir. Law R., N. S. 691; *McCarthy v. O'Brien*, 2 Ir. Law R. 67; *Morrogh v. Power*, 5 id. 494.

⁴ *Grenfell v. Girdlestone*, 2 Y. & C., Ex. R. 676, per Alderson, B.; *Godwin v. Culley*, 4 H. & N. 378—380; *Fuller v. Redman*, 26 Beav. 614; *In re Hindmarsh*, 1 Drew. & Sm. 129; *Bush v. Martin*, 2 H. & C. 311. See post, § 1091.

⁵ *Cripps v. Davis*, 12 M. & W. 159; *Mountstephen v. Brooke*, 3 B. & A. 141. In *Bourdin v. Greenwood*, 41 L. J., Ch. 73; 13 Law Rep., Eq. 280, S. C.; *Wickens, V.-C.*, decided a curious point in connexion with this subject. The maker of a promissory note bearing date, Jan., 1846, was in 1866 pressed for payment, whereupon he took the note, altered the date by converting the 4 of 1846 into a 6, indorsed his name as follows: “W. H. Langley, 1866,” and then returned the note to the holder. A creditor’s suit being subsequently brought, the Vice-Chancellor held, that the endorsement was a sufficient acknowledgment to bar the stat., and that the note, notwithstanding the alteration of the date, was still a valid document. Sed qu.

sion of *some* debt being due, is sufficient, and the amount may be ascertained by extrinsic evidence; but if no proof be given on this head, the plaintiff will be entitled merely to nominal damages.¹ Sixthly, the promise or acknowledgment in writing need not specify either the person to whom, or the time when, it was made, but both these points may be established by parol evidence.² Seventhly, even an infant, by giving a written acknowledgment of a debt due for *necessaries*, will take the debt out of the statute.³ Eighthly, it matters not under this statute, any more than under the Statute of Frauds,⁴ to what part of the document the signature of the party making the acknowledgment is attached.⁵ Ninthly, the promise, acknowledgment, or part-payment, must be made before action brought, since they severally bar the statute, not, as was formerly supposed, upon the ground of their rebutting the presumption of payment, but because they amount to a new promise.⁶ Lastly, the promise proved, whether express or implied, must correspond with that laid in the statement of claim;⁷ and therefore, an acknowledgment made to or by an executor or administrator will not support a count laying the promise to or by the testator or intestate.⁸

§ 1076. In accordance with the second and third rules stated § 98

¹ *Spong v. Wright*, 9 M. & W. 633, per Alderson, B.; *Lechmere v. Fletcher*, 1 C. & M. 623; 3 Tyr. 450, S. C.; *Cheslyn v. Dalby*, 4 Y. & C., Ex. R. 238; *Waller v. Lacy*, 1 M. & Gr. 54, 71; 8 Dowl. 563; 1 Scott, N. R. 186, S. C.; *Dickinson v. Hatfield*, 1 M. & Rob. 141, per Ld. Tenterden; 5 C. & P. 46, S. C.; *Bewley v. Power*, Hayes & Jon. 368; *Shickernell v. Hotham*, 1 Kay, 669. These cases overrule the dicta of the court in *Kennet v. Milbank*, 8 Bing. 38. See *Hartley v. Wharton*, 11 A. & E. 934; 3 P. & D. 529, S. C.; post, § 1091; and ante, § 1024.

² *Hartley v. Wharton*, 11 A. & E. 934; 3 P. & D. 529, S. C.; *Edmunds v. Downes*, 2 C. & M. 459; 4 Tyr. 173, S. C. See *Lobb v. Stanley*, 3 Q. B. 574.

³ *Williams v. Smith*, 24 L. J., Q. B. 62; S. C. nom. *Willins v. Smith*, 4 E. & B. 180. But see post, § 1084.

⁴ Ante, § 1028.

⁵ *Holmes v. Mackrell*, 3 Com. B., N. S. 789.

⁶ *Bateman v. Pinder*, 3 Q. B. 574, overruling *Yea v. Fouraker*, 2 Burr. 1099.

⁷ *Tanner v. Smart*, 6 B. & C. 608, 609, per Ld. Tenterden; *Cripps v. Davis*, 12 M. & W. 167, per Parke, B.

⁸ *Sarell v. Wine*, 3 East, 409; *Browning v. Paris*, 5 M. & W. 120, per Parke, B.; *Tanner v. Smart*, 6 B. & C. 608, 609.

above, letters, in substance as follows, have been held insufficient, as not amounting to *unqualified acknowledgments*. "I intend to pay A.'s claim if allowed time; if I am proceeded against, any exertion of mine will be rendered abortive;"¹—"I have been expecting to be able to give a satisfactory reply to your application respecting B.'s demand against me. I will call upon you to-morrow on the matter;"²—"I will have nothing to do with your claim; you can make me a bankrupt, but I had rather go to gaol than pay you;"³—"I owe the money, but I will never pay it;"⁴—"I am sure my account was settled; but as you say it was not, I will pay you 10*l.* a year if you like to accept that sum;"⁵—"If in funds I would immediately pay the money, and take the bill of exchange out of your hands;"⁶—"I admit as executor your claim on the estate, and think it just, but I am compelled to refuse payment as the legatees object;"⁷—"I will not fail to meet you on fair terms, and hope, within perhaps a week, to be able to pay you at all events a portion of the debt, when we shall settle about the liquidation of the balance;"⁸—"I send you an account of some debts due to me; collect them, and pay yourself, and you and I shall then be clear;"⁹—"Arrangements have been made to enable me to discharge your debt; funds have been appointed for that purpose, of which A. is trustee, and to him I refer you for further information;"¹⁰—"Send me in any demand you have to make on me, and, *if just*, I shall not give you the trouble of going to law;"¹¹—"I will not pay your

¹ Fearn *v.* Lewis, 6 Bing. 349; 1 M. & P. 1, S. C.

² Morrill *v.* Frith, 3 M. & W. 402; 8 C. & P. 246, S. C.; Hamilton *v.* Terry, 11 Com. B. 954; Cawley *v.* Furnell, 12 Com. B. 291.

³ Linsell *v.* Bonsor, 2 Bing. N. C. 241; 2 Scott, 399, S. C.

⁴ A'Court *v.* Cross, 3 Bing. 329.

⁵ Buckmaster *v.* Russell, 2 Fost. & Fin. 389; 10 Com. B., N. S. 745, S. C.

⁶ Richardson *v.* Barry, 29 Beav. 22.

⁷ Briggs *v.* Wilson, 5 De Gex, M. & G. 12, 21.

⁸ Hart *v.* Prendergast, 14 M. & W. 741; Smith *v.* Thorne, 21 L. J., Q. B. 199; 18 Q. B. 134, S. C.; Rackham *v.* Marriott, 1 H. & N. 234; 2 H. & N. 196, S. C., in Ex. Ch.

⁹ Routledge *v.* Ramsay, 8 A. & E. 221; 3 N. & P. 319, S. C.

¹⁰ Whippley *v.* Hillary, 3 B. & Ad. 399; 5 C. & P. 209, S. C. This case overrules Baillie *v.* I.d. Inchiquin, 1 Esp. 435, as the court admitted in Routledge *v.* Ramsay, 8 A. & E. 223, 224.

¹¹ Spong *v.* Wright, 9 M. & W. 629. See Collinson *v.* Margesson, 27 L. J. Ex. 305; Cassidy *v.* Firman, 1 R., I. C. L. 8.

demand, for it is of more than six years standing;"¹—"I have sent you a note for the money I owe you," the note so sent being inadmissible in evidence for want of a proper stamp.²

§ 1077. So, the following *conditioned acknowledgments* have been deemed insufficient, in the absence of proof that the conditions had respectively been fulfilled :—"I cannot pay the debt now, but I will as soon as I can;"³—"We are waiting a remittance from Liverpool against beef we want to sell; when it comes, we shall send you the amount of the bill;"⁴—"I shall be most happy to pay you principal and interest as soon as convenient."⁵

§ 1078. On the other hand, cases have been taken out of the operation of the statute, when the letters, in substance, contained such expressions as the following :—"I can never be happy till I have paid you ; your account is correct, and would that I were now going to inclose the amount ;"⁶—"I wish I could comply with your request, for I am anxious to pay your bill. I hope that out of the present harvest it will be paid; if not, the concern must be broken up to meet it;"⁷—"I am in your debt, and will not avail myself of the statute; but we do not agree as to the amount, and until this be ascertained, I cannot move a step towards giving you satisfaction, and doing justice to my other creditors;"⁸—"I will pay

¹ Brigstocke v. Smith, 1 C. & M. 483; 2 Tyr. 445, S. C.; Coltman v. Marsh, 3 Taunt. 380.

² Parmiter v. Parmiter, 1 Johns. & Hem. 135; 3 De Gex, F. & J. 461, S. C.

³ Tanner v. Smart, 6 B. & C. 603; 9 D. & R. 549, S. C.; Haydon v. Williams, 7 Bing. 167, per Tindal, C. J.; Ayton v. Bolt, 4 Bing. 105; Gould v. Shirley, 2 M. & P. 581.

⁴ Hodgens v. Graham, Alc. & Nap. 49.

⁵ Edmunds v. Downes, 2 C. & M. 459; 4 Tyr. 173, S. C.; Meyerhoff v. Froehlich, L. R., 3 C. P. D. 333; 48 L. J., C. P. 43, per Ct. of App., S. C., and L. R., 4 C. P. D. 63.

⁶ Dodson v. Mackey, 8 A. & E. 225, n.; 4 N. & M. 327, S. C.

⁷ Bird v. Gammon, 3 Bing. N. C. 83; 5 Scott, 213, S. C.; Martin v. Geoghegan, 13 Ir. Law R. 403.

⁸ Gardner v. M'Mahon, 3 Q. B. 561; 2 G. & D. 593, S. C. This case was questioned by Alderson, B., in Hart v. Prendergast, 14 M. & W. 746. See Leland v. Murphy, 16 Ir. Eq. R., N. S. 500; Crawford v. Crawford, I. R., 2 Eq. 166; Burrows v. Baker, I. R., 3 Eq. 596; Bewley v. Power, Hayes & Jon. 368; and Prance v. Sympton, 1 Kay, 678, cited ante, p. 922, n. ³.

you your debt by instalments, but I demur to pay the interest;"¹—"Your bill does not sufficiently specify the work done, and I shall feel obliged if you will more particularly explain it. I will settle your account immediately; but being at a distance, I want everything explicit. Tell H. to send me the agreements, and I will return them by the first post with instructions to pay, if correct;"²—"The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands;"³—"I shall be obliged to you to send in your account, and can give no further orders till this be done;"⁴—"If you send me the particulars of your account with vouchers, I will examine it and send cheque. But the amount cannot be anything like the amount you now claim;"⁵—"I am ashamed your account has stood so long; I must trespass on your kindness a little longer, till a turn in trade takes place;"⁶—"Your demand is not just; I am not in your debt anything like 90*l.*; I will settle the difference when we meet;"⁷—"I have recived your letter," [which stated that some items in the bill sent with it were of more than six years' standing]; "P. will attend for me to tax your costs, and one will then know what to pay, the other what to receive;"⁸—"I send you my account, leaving a blank for your counter-demand on me, and beg that you will favour me with the balance;"⁹—"I will at any time pay my

¹ *Shah Mukhun Lall v. Nawab Imtiazood Dowlah*, 10 Moo. Ind. App. C. 362. See *Wilby v. Elgee*, 10 Law Rep., C. P. 497.

² *Sidwell v. Mason*, 2 H. & N. 306; *Godwin v. Culley*, 4 H. & N. 373.

³ *Chasemore v. Turner*, 10 Law Rep., Q. B. 500, per Ex. Ch.; 45 L. J., Q. B. 66, S. C.; but see *Green v. Humphreys*, L. R., 26 Ch. D. 474, S. C.; 53 L. J., Ch. 625, per Ct. of App., reversing S. C. in L. R., 23 Ch. D. 207, and 52 L. J., Ch. 659, per Pollock, B.

⁴ *Quincey v. Sharpe*, L. R., 1 Ex. D. 72; 45 L. J., Ex. 347, S. C.

⁵ *Skeat v. Lindsay*, 46 L. J., Ex. 249; L. R., 2 Ex. D. 314, S. C. nom. *Skeat v. Lindsay*.

⁶ *Cornforth v. Smithard*, 5 H. & N. 13; *Lee v. Wilmot*, 35 L. J., Ex. 175; 1 Law Rep., Ex. 364; and 4 H. & C. 469, S. C.

⁷ *Colledge v. Horn*, 3 Bing. 119; 10 Moore, 431, S. C.; *Edmonds v. Goater*, 15 Beav. 415.

⁸ *Murphy v. Meredith*, 5 Ir. Law R. 120. Held, that this was not a conditional acknowledgment, on which the plaintiff could only recover on proof of taxation of costs. See *Archer v. Leonard*, 15 Ir. Eq. R., N. S. 267.

⁹ *Waller v. Lacy*, 1 M. & Gr. 54; 1 Scott, N. R. 186; 8 Dowl. 563, S. C.; *Williams v. Griffith*, 3 Ex. R. 335.

proportion of the joint debt;"¹—"I cannot comply with your request yet; the best way for you will be to send me the bill you hold, and draw another for 30*l.*, the balance of your money."²

§ 1079. In order to take a case out of the Statute of Limitations § 992 by a *part-payment*, it is not necessary that at the time of the payment the exact amount remaining due should be distinctly ascertained.³ Still, it must appear that the payment was made, not only on account of a debt, but *on account of the debt* for which the action is brought; and therefore, if there be two undisputed but entirely separate debts, a part payment within six years, not specifically appropriated, will not, as it seems, bar the statute as to either.⁴ Moreover, it must appear that the payment was made in *part* discharge of the debt declared on; for the meaning of *part-payment* is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part-payment implies an admission of such greater sum being then due, and a promise to pay it.⁵ The circumstances, too, must be such as to warrant the jury in inferring a promise to pay the remainder; and therefore, if part-payment be accompanied by a positive refusal to pay any more, it will not take the case out of the statute, though the debtor admits that the remainder is due.⁶ The payment, also, of a dividend under the Bankruptcy law,⁷ or the payment of interest in pursuance of a judgment obtained in a former action, to which

¹ *Lechmere v. Fletcher*, 1 C. & M. 623; 3 Tyr. 450, S. C.

² *Dabbs v. Humphries*, 10 Bing. 446. See, also, *Evans v. Simon*, 9 Ex. R. 282; *Collis v. Stack*, 1 H. & N. 605. The older authorities are not here referred to, as few of them are law. They will be found noticed in 2 St. Ev. 662—667.

³ *Walker v. Butler*, 25 L. J., Q. B. 377; 6 E. & B. 506, S. C.

⁴ *Burn v. Boulton*, 2 Com. B. 476. But see *Walker v. Butler*, 6 E. & B. 509—511. See, also, *Nash v. Hodgson*, cited post, § 1081.

⁵ *Tippets v. Heane*, 1 C. M. & R. 252; 4 Tyr. 772, S. C.; *Waters v. Tompkins*, 2 C. M. & R. 723; Tyr. & Gr. 137, S. C.; *Waugh v. Cope*, 6 M. & W. 824, 829. See *Worthington v. Grimsditch*, 7 Q. B. 479.

⁶ *Wainman v. Kynman*, 1 Ex. R. 118.

⁷ *Topping*, Ex parte, In re *Levey & Robson*, 34 L. J., Bkpty. 44, per Ld. Cranworth, C.; *Davies v. Edwards*, 7 Ex. R. 22.

the Statute of Limitations has been unsuccessfully pleaded, is open to the same objection. The reason why the effect of part-payment is left untouched by Lord Tenterden's Act appears to be, that it is an admission evidenced by an *act*, and, as such, not so liable to misinterpretation or mistake as a *mere* acknowledgment by *words*.²

§ 1080. It has been urged that, on the same ground, the sale and delivery of goods, which, equally with the payment of money, are acts done, should be exempted from the operation of Lord Tenterden's Act; but the answer is that, however this may be in theory, the statute in fact contains no exception in favour of the sale or delivery of goods. These acts, therefore, are not sufficient to take a case out of the Statute of Limitations, unless done under circumstances which would render the delivery equivalent to payment;³ as, for instance, if the parties were expressly to agree that goods delivered by the one should be taken by the other in part payment of the debt.⁴ In such a case the statute would be barred, for the Legislature never intended that the "part-payment" should necessarily be in actual money, but it will suffice if it be made in any mode which the parties agree shall be treated as equivalent to a money payment.⁵

§ 1081. Neither will the existence of *items* within six years in an open account, operate to take the previous portion of the account out of the Statute of Limitations, but there must be an actual part-payment in cash, or something equivalent to it.⁶ Moreover, if in a

¹ *Morgan v. Rowlands*, 41 L. J., Q. B. 187; 7 Law Rep., Q. B. 493, S. C.

² *Waters v. Tompkins*, 2 C. M. & R. 726, per Parke, B.; *Bodger v. Arch*, 10 Ex. R. 340, per id.

³ *Cottam v. Partridge*, 4 M. & Gr. 271, 287—289, 291—293; 4 Scott, N. R. 819, S. C.; overruling *Catlin v. Skoulding*, 6 T. R. 189, as only applicable to the state of the law previous to the passing of Lord Tenterden's Act. See, also, *Williams v. Griffiths*, 2 C. M. & R. 46, 47, per Parke, B.

⁴ *Hart v. Nash*, 2 C. M. & R. 337; *Hooper v. Stephens*, 4 A. & E. 71; 7 C. & P. 260, S. C.; *Blair v. Ormond*, 17 Q. B. 434, 435. See *Hughes v. Pamore*, 24 L. J., Ch. 681; 7 De Gex, M. & G. 229, S. C.

⁵ *Bodger v. Arch*, 10 Ex. R. 333, 340, per Parke, B.; *Amos v. Smith*, 31 L. J., Ex. 423; 1 H. & C. 238, S. C.; *Maber v. Maber*, 36 L. J., Ex. 70; 2 Law Rep., Ex. 153, S. C.

⁶ *Cottam v. Partridge*, 4 M. & Gr. 271; 4 Scott, N. R. 819, S. C.; *Williams*
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continuous account some items have accrued before, and others within, the six years, the mere payment of a sum by the debtor, without any evidence of an appropriation on his part, or of an intention to apply such sum in part discharge of the earlier items, will not have the effect of exempting them from the operation of the Statute of Limitations; though, in such case, the creditor may at any time apply the payment to the debts that have been due for a longer period than six years.¹ Where a party had been the maker of three promissory notes, two of which were barred by the statute, but the other was not barred, a payment made by him on account of interest generally was attributed exclusively to the note which was not barred.² It has been held in one case, that the going through an account with items on both sides, and striking a balance, was an act equivalent to part-payment; the apparent ground of the decision being, that such a proceeding converted the *set-off* into *payments*, and raised a new consideration for the liquidation of the balance.³ Be this as it may, the doctrine will not extend to a case where an account has been furnished merely by one party, even though it contain cross-items, and fix the balance due.⁴ Neither will it apply where the account actually stated and settled by both parties contains items on one side only,⁵ for it will then be no more than a mere parol statement of, and promise to pay, an existing debt; and to hold such a statement of account to be sufficient, would be to repeal the statute.⁶

§ 1082. Though the payment, in order to take the case out of the operation of the statute, may be either of principal or of interest,

v. Griffiths, 2 C. M. & R. 45; 5 Tyr. 748, S. C.; *Mills v. Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444, S. C.; *Waller v. Lacy*, 1 M. & Gr. 54, 75; 1 Scott, N. R. 186, S. C.; *Williams v. Griffith*, 3 Ex. R. 335.

¹ *Mills v. Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444, S. C. See *Re Rainforth*, 49 L. J., Ch. 5, per Ct. of App., overruling a decision by Fry, J., reported in 48 L. J., Ch. 725.

² *Nash v. Hodgson*, 25 L. J., Ch. 186; 6 De Gex, M. & G. 474, S. C., reversing decision of Wood, V.-C., reported in 1 Kay, 650.

³ *Ashby v. James*, 11 M. & W. 542.

⁴ *Bristow v. Miller*, 11 Ir. Law Rep., 461, 472.

⁵ *Ashby v. James*, 11 M. & W. 543, 544, per Alderson, B., apparently overruling *Smith v. Forty*, 4 C. & P. 126, per Vaughan, B.

⁶ *Jones v. Ryder*, 4 M. & W. 32; *Reeves v. Hearne*, 1 M. & W. 323; *Hopkins v. Logan*, 5 M. & W. 218, per Parke & Alderson, Bs.; *Clark v. Alexander*, 8 Scott, N. R. 147.

yet if the debt be made up of sums due on both these accounts, the payment of the principal will raise no implied promise to pay the interest, at least, if accompanied by a refusal to pay it;¹ but the payment of interest barred by the statute, though it does not necessarily prove that the principal money is due, is some evidence of that fact;² and if coupled with other circumstances, as, for instance, if the interest was due upon a note, which was allowed to remain in the hands of the payee, the payment of that interest might fairly be regarded as a sufficient acknowledgment of the currency of the note, to revive the claim for the principal.³ Where a bill is drawn in part payment of a debt, it operates to defeat the statute from the time of its delivery to the creditor,⁴ and this, too, whether the bill be subsequently honoured or not; for the word "payment" in Lord Tenterden's Act, must be taken to be used by the Legislature in a popular sense, and in a sense large enough to include not only payments in actual satisfaction, but also conditional payments.

§ 1083. With respect to the mode of proving the *fact* of payment, § 996 the courts for many years put a forced, though salutary, construction on Lord Tenterden's Act, and held that the fact could not be established by *any admission* of the debtor short of an acknowledgment in writing duly signed.⁵ This doctrine, however, was at length rejected by the Exchequer Chamber as untenable, and it is now settled law that a mere parol acknowledgment, either of part payment of principal, or of payment of interest, within six years, will suffice to take the case out of the Statute of Limitations.⁶ It seems almost needless to add, that, when the fact of some payment having been made has once been proved, recourse can be had to the

¹ Collyer v. Willock, 4 Bing. 313.

² Purdon v. Purdon, 10 M. & W. 562.

³ Bealy v. Greenslade, 2 C. & J. 61; Bamfield v. Tupper, 7 Ex. R. 27; Rutherford, Re, 49 L. J., Ch. 654; overruling S. C., Id. 345; also reported in L. R., 14 Ch. D. 687.

⁴ Turney v. Dodwell, 3 E. & B. 136; Irving v. Veitch, 3 M. & W. 90; Gowan v. Foster, 3 B. & Ad. 507.

⁵ Bayley v. Ashton, 12 A. & E. 493; 4 P. & D. 294, S. C.; Willis v. Newham, 5 Y. & J. 518; Maghee v. O'Neil, 7 M. & W. 531; Eastwood v. Saville, 9 M. & W. 615.

⁶ Cleave v. Jones, 6 Ex. R. 573. See, also, Edwards v. Janes, 1 Kay & J. 534.

parol admissions of the debtor, whether made before, or after, or at the time of payment, for the purpose of showing on what account that payment was made.¹ Though reasonable evidence must be given of the identity of the debt, on account of which payment was made, with that which forms the subject-matter of the action,² the jury will be warranted in inferring such identity, in the absence of any proof of more debts than one being acknowledged to be due.³

§ 1084. Under § 5 of Lord Tenterden's Act⁴ "no action could be maintained whereby to charge any person upon any *promise made after full age to pay any debt contracted during infancy*, or upon any ratification after full age of any promise or simple contract made during infancy, unless such *promise or ratification* were made by *some writing signed by the party to be charged therewith*." As that provision was not considered sufficiently stringent to protect improvident young men from designing sharpers, the Legislature again interposed in 1874, and passed an enactment which absolutely prohibits the bringing of any action "upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."⁵ These words will include ratification made after the 7th of August, 1874, even though it relate to a contract made before that date;⁶ they will extend to the ratification of a promise to marry;⁷ and they will also, in judicial construction, be held applicable to any

¹ *Waters v. Tompkins*, 2 C. M. & R. 723; Tyr. & Gr. 137, S. C.; *Bevan v. Gething*, 3 Q. B. 740; 3 G. & D. 59, S. C.; *Edan v. Dudfield*, 1 Q. B. 307, 308, per Ld. Denman. See *Baildon v. Walton*, 1 Ex. R. 617.

² *Waters v. Tompkins*, 2 C. M. & R. 727, per Parke, B.

³ *Evans v. Davies*, 4 A. & E. 840; 3 N. & P. 464, S. C.; *Burn v. Boulton*, 2 Com. B. 476. As to the law, where payment is made by one of several joint debtors, see ante, §§ 744—746.

⁴ 9 G. 4, c. 14, § 5, repealed by 38 & 39 V., c. 66.

⁵ 37 & 38 V., c. 62, § 2.

⁶ Ex parte Kibble, re Onslow, 10 Law Rep., Ch. App. 373.

⁷ *Coxhead v. Mullis*, L. R., 3 C. P. D. 439; 47 L. J., C. P. 761, S. C. But see *Northcote v. Doughty*, L. R., 4 C. P. D. 385; and *Ditcham v. Worrall*, L. R., 5 C. P. D. 410; 49 L. J., C. P. 688, S. C., in which the fixing of the wedding-day by the parties was regarded by the court as tantamount to a fresh promise.

set-off or counter-claim, although, in strict interpretation, the language of the Act would seem *primâ facie* to be confined to actions brought.¹

§ 1085. § 6 of Lord Tenterden's Act enacts, that "no action shall be brought, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon,"² unless such representation or assurance be made in writing, signed by the party to be charged therewith."³ This provision,—which is now in substance extended to Scotland by the Act of 19 & 20 Vict., c. 60, s. 6,—was rendered necessary by the case of *Pasley v. Freeman*,⁴ which afforded ample opportunity for evading the enactment of the Statute of Frauds, that required guarantees to be in writing,⁵ by enabling the plaintiff to shape his demand, not upon a special *promise* to answer for the debt or default of another, but upon a *tort* or wrong done to him, by some false or fraudulent representation made by the defendant, in order to induce him to contract with another person. § 998

§ 1086. The meaning of the word "ability," mentioned in the section, has been the subject of more than one lengthened discussion in the courts of law. In *Lyde v. Barnard*,⁶ an action was brought against the trustees of Lord Edward Thynne, for falsely representing that Lord Edward's life-interest in certain trust property was charged with only three annuities, whereby the plaintiff was induced to purchase an annuity from Lord § 999

¹ *Rawley v. Rawley*, L. R., 1 Q. B. D. 460; 45 L. J., Q. B. 674, S. C. in Ct. of App.

² The word "upon" is obviously a misprint.

³ See *Swift v. Jewesbury*, 43 L. J., Q. B. 56, per Ex. Ch.; 9 Law Rep., Ch. App. 301, S. C., where it was held that the signature of a manager of a banking company was not the signature of the bank within the meaning of this Act, overruling *Swift v. Winterbotham*, 42 L. J., Q. B. 111; 8 Law Rep., Q. B. 244, S. C.

⁴ 3 T. R. 51; 2 Smith, L. C. 68, S. C.

⁵ Ante, §§ 1019, 1030—1034.

⁶ 1 M. & W. 101; Tyr. & Gr. 250, S. C. See 1 Smith, L. C. 167—169.

Edward, secured by his bond, &c., and by an assignment of his interest in the trust fund; whereas the defendant well knew that the said interest was also charged with a mortgage of 20,000*l*. It appearing at the trial that the representations were by parol, the judges of the Court of Exchequer were equally divided on the question, whether they related to the ability of Lord Edward; Barons Parke and Alderson contending that they simply had reference to the state of the fund; but Lord Abinger and Baron Gurney, with apparently more reason, holding that they related to the state of the fund, as an element only of Lord Edward's personal credit, and that substantially the question which they purported to answer, regarded his ability to give security of adequate value. This last opinion is somewhat confirmed by a subsequent decision of the Court of Queen's Bench.¹ There, a false representation by a solicitor, that his client might be safely trusted, because he had lately purchased an estate, and the title deeds were in his (the solicitor's) possession, so that the client could do nothing without his knowledge, was held by the judges to be a representation respecting the ability of the client, which, consequently, required to be in writing.

§ 1087. In order to come within the meaning of the Act, it is not necessary that the action should be brought directly upon the representation; but where a plaintiff sought, in an action for money had and received, to recover the value of goods which he had supplied to a third party on the defendant's representation, and which had been sold by such third party, and the proceeds paid to the defendant, the court held that, as the plaintiff's case rested on the misrepresentation alone, it directly fell within the terms of the Act.² Perhaps, had the misrepresentation formed only one link in the chain of fraud, by which the plaintiff had been deprived of his goods, the result might have been different.³ The Act also applies to a misrepresentation made by one partner respecting the credit of the firm.⁴ When several false representations respecting a man's character have been made by different

¹ *Swann v. Phillips*, 8 A. & E. 457; 3 N. & P. 447, S. C.

² *Haslock v. Fergusson*, 7 A. E. 86; 2 N. & P. 269, S. C.

³ *Id.*

⁴ *Devaux v. Steinkeller*, 6 Bing. N. C. 84; 8 Scott, 202, S. C.

persons, or when the same person has made one representation in writing and another in conversation, the action will be maintainable, if the jury are of opinion that the plaintiff was mainly or even partially induced by the writing declared on to give the credit which occasioned the loss.¹

§ 1088. To take a case out of the *Real Property Limitation Acts* § 1001 of 1833,² or 1874,³ the several acknowledgments mentioned therein must all be in writing and duly signed. Thus, under § 14 of the first Act, "an acknowledgment of the title of the person entitled to any land, or rent," must, in order to neutralize the effect of his discontinuance of the possession, or of the receipt of the profits, or of rent, be "given to him or his agent in writing, signed by the person in possession, or in the receipt of the profits of such land, or in receipt of such rent." So, under § 7⁴ of the last Act, "an acknowledgment in writing of the title of the mortgagor, or of his right of redemption," must, in order to keep alive his rights, in the event of the mortgagee obtaining the possession or receipt of the profits of any land, or the receipt of any rent, be "given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him."⁵ § 8⁶ of the last Act also enacts, that "no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land⁷ or rent, at law or in equity, or any legacy, but within twelve years next

¹ *Wade v. Tatton*, 25 L. J., C. P. 240.

² 3 & 4 W. 4, c. 27; extended to Ireland by 6 & 7 V., c. 54, and 7 & 8 V., c. 27. See ante, § 74, n. ⁴.

³ 37 & 38 V., c. 57. See ante, § 74, n. ⁴.

⁴ Set out verbatim, ante, § 747, n. ⁷.

⁵ As to what is a sufficient acknowledgment to satisfy these words, see *Stansfield v. Hobson*, 16 Beav. 236; 3 De Gex, M. & G. 620, S. C.; *Trulock v. Robey*, 12 Sim. 402; *Thompson v. Bowyer*, 2 New R. 504, per Romilly, M. R.

⁶ This section has been substituted for § 40 of 3 & 4 W. 4, c. 27, which section was repealed by § 9 of 37 & 38 V., c. 57.

⁷ Money due on a bond executed by an ancestor is not a sum "charged upon, or payable out of, any land," within the meaning of this section; *Roddam v. Morley*, 1 De Gex & J. 1; 26 L. J., Ch. 438, S. C.; 25 L. J., Ch. 329, S. C., cor. Wood, V.-C.; *Morley v. Morley*, 25 L. J., Ch. 1; 6 De Gex, M. & G. 610, S. C.

after a present right to receive the same shall have accrued to some person, capable of giving a discharge for, or release of, the same; unless, in the meantime,¹ some part of the principal money, or some interest thereon, shall have been paid, or some *acknowledgment* of the right thereto shall have been given in *writing signed by the person by whom the same shall be payable*,² or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought, but within twelve³ years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.”⁴

§ 1089. No acknowledgment of any title mentioned in these Acts will be operative to restore such title after it has once been extinguished by the effluxion of time.⁵ The acknowledgment, also, must be distinct and unconditional; and, therefore, where a party in adverse possession of land, on being applied to by the person claiming title to it, to pay rent and take a lease, wrote in answer:—“Although, if matters were contested, I think I could establish a legal right to the premises, yet, under all the circumstances, I will accede to your proposal of my paying a moderate rent, on an agreement for a term of twenty-one years;”—it was held, that, as this arrangement was never carried into effect, the letter written with a view to it could not be regarded as an acknowledgment of title, within the meaning of § 14 of the Act of 1833.⁶ Where an acknowledgment of title is distinct, no objection can be taken to it on the ground that it was obtained by compulsion and given upon oath. An answer, therefore, to a bill in Chancery under

§ 1002

¹ As to the meaning of these words, see *Harty v. Davis*, 13 Ir. Law R. 23.

² As to the meaning of these words, see and compare *Toft v. Stephenson*, 1 De Gex, M. & G. 28, 40; *Pears v. Laing*, 40 L. J., Ch. 225, per Bacon, V.-C.; *Bolding v. Lane*, 1 De Gex, J. & S. 122, per Ld. Westbury, overruling S. C. as decided by Stuart, V.-C., 3 Giff. 561; and *In re Fitzmaurice*, 15 Ir. Eq. R., N. S. 445.

³ See *Sutton v. Sutton*, L. R., 22 Ch. D. 511; 52 L. J., Ch. 333, S. C.; *Fearnside v. Flint*, L. R., 22 Ch. D. 579; 52 L. J., Ch. 479, S. C.

⁴ See 23 & 24 V., c. 38, § 13, as to claims to the estates of persons dying intestate; also, *Reed v. Fenn*, 35 L. J., Ch. 464.

⁵ *Sanders v. Sanders*, L. R., 19 Ch. D. 373, per Ct. of App.; 51 L. J., Ch. 276, S. C.

⁶ *Doe v. Edmonds*, 6 M. & W. 295. See *Doe v. Beckett*, 4 Q. B. 601, and cases cited in the last five notes.

the old forms of pleading will, if it acknowledges the plaintiff's title, be sufficient to satisfy the statute.¹

§ 1090. Again, the Act passed in 1833 for the Amendment of the Law,²—after enacting that all actions of debt for rent upon an indenture of demise, or of covenant or debt upon any bond or other specialty, or of debt or scire facias upon recognizance, must be brought within twenty years after the cause of such actions or suits,³—provides, that “if any acknowledgment shall have been made, either by *writing signed* by the *party liable* by virtue of such indenture, specialty, or recognizance, or *his agent*, or by part-payment⁴ or part-satisfaction, on account of any principal or interest being then due thereon,” the plaintiff may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment.⁵ § 1003

§ 1091. With respect to acknowledgments by signed writings § 1004 under this Act, it seems to be clear, that the amount need not be specified in them any more than in acknowledgments under Lord Tenterden's Act; but if *anything* be due, the amount may be proved by parol evidence.⁶ The acknowledgment, too, need not amount to a promise to pay,⁷ though it must contain an admission of an actually existing debt, and if it merely shows that a debt was due at some prior time, it will not suffice.⁸ Unlike the law which governs the admissions of simple contract debts under the old Statute of Limitations,⁹ an acknowledgment made to a third party will satisfy this Act;¹⁰ and where a mortgagor, in assigning his equity of redemption, had recited that all interest was paid

¹ *Goode v. Job*, 28 L. J., Q. B. 1; 1 E. & E. 6, S. C.

² 3 & 4 W. 4, c. 42.

³ § 3, set out, ante, p. 97, n. 4. The Irish Act, 16 & 17 V., c. 113, contains a somewhat similar provision, in § 20.

⁴ See *Ashlin v. Lee*, 44 L. J., Ch. 376, per Lds. Js.

⁵ § 5; and 16 & 17 V., c. 113, § 23, Ir.

⁶ *Howcutt v. Bonser*, 3 Ex. R. 496, per Parke, B.; see ante, § 1075.

⁷ *Moodie v. Bannister*, 4 Drew. 432, per Kindersley, V.-C. See ante, § 1075.

⁸ *Howcutt v. Bonser*, 3 Ex. R. 491.

⁹ See ante, § 1075.

¹⁰ *Moodie v. Bannister*, 4 Drew. 432, resolving a point left undecided in *Howcutt v. Bonser*, 3 Ex. R. 491, 499, 500. See *Wilby v. Elgee*, 10 Law Rep., C. P. 497.

upon the mortgage, the court held, in an action brought by the mortgagee against the mortgagor on the original mortgage deed, within twenty years from the date of the assignment, that such recital was ample evidence of an acknowledgment by part-payment of interest, so as to take the case out of the statute.¹ The assignee, too, in this case, having in pursuance of a covenant contained in the deed of assignment paid the future interest to the mortgagee, such payment was considered by the judges to be a sufficient acknowledgment as against the mortgagor.²

§ 1092. By the *Prescription Acts*, claims to rights of common § 1005 and other profits à prendre,³ to rights of way or other easements, to the use of light, to the payment of a modus, or to exemption from tithes, are rendered indefeasible after the lapse of certain defined periods, unless it shall appear that the respective privileges were enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing."⁴

§ 1093. A proviso is contained in § 7 of the Railway and Canal Traffic Act of 1854,⁵ to the effect that no special contract between any railway or canal company and any other party respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party, unless it be just and reasonable, and be signed by such party, or by the person delivering such things for carriage.⁶

¹ Forsyth v. Bristowe, 8 Ex. R. 716.

² Id.

³ The Act does not apply to profits à prendre in gross, *Shuttleworth v. Le Fleming*, 19 Com. B., N. S. 687; or to rights claimed by a copyholder in his own tenement according to the custom of the manor, *Hanmer v. Chance*, 4 De Gex, J. & S. 626.

⁴ 2 & 3 W. 4, c. 71, §§ 1, 2, 3, cited ante, p. 97, n. ²; extended to Ireland by 21 & 22 V., c. 42; 2 & 3 W. 4, c. 100, § 1. See ante, p. 96.

⁵ 17 & 18 V., c. 31; *Gregory v. W. Midl. Ry. Co.*, 33 L. J., Ex. 155.

⁶ See *Wise v. Gt. West. Ry. Co.*, 25 L. J., Ex. 258; 1 H. & N. 63, S. C.; *Simons v. Gt. West. Ry. Co.*, 18 Com. B. 805; 2 Com. B., N. S. 620; *Lond. & N.-West. Ry. Co. v. Durham*, id. 826; *Pardington v. S. Wales Ry. Co.*, 1 H. & N. 392; *Peck v. N. Stafford. Ry. Co.*, 10 H. of L. Cas. 473; S. C. 32 L. J., Q. B. 241, per Dom. Proc., reversing S. C. in Ex. Ch. 5 E. & B. 989; and affirming S. C. in Q. B., 27 L. J., Q. B. 465; E. B. & E. 958, S. C.; *M'Manus v. Lanc. & Yorkshire Ry. Co.*, 4 H. & N. 327, per Ex. Ch., reversing S. C. in Ex., 2 H. & N. 693; *Lewis v. Gt. West. Ry. Co.*, 5 H. & N. 867; same name, but different case, L. R., 3 Q. B. D. 195, per Ct. of App.; *Beal v.*

§ 1094. Under the Bills of Exchange Act, 1882, an acceptance of a bill is invalid, unless, among other conditions, “it be written on the bill and be signed by the drawee;” but “the mere signature of the drawee without additional words is sufficient.”¹ § 1005B

§ 1095. Again, the Truck Act of 1831 contains a special proviso, that no stoppage or deduction shall in any case be made from the wages of any artificer protected by that statute, unless the agreement “for such stoppage or deduction shall be in writing, and signed by such artificer.”² § 1005C

§ 1096. Under the Act for amending the law of distress, a lodger,³ who seeks to protect his goods from being distrained upon for rent due to the superior landlord, must “make a declaration in writing” to the effect stated in the Act, “and to such declaration shall be annexed a correct inventory subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration.”⁴ The declaration, too, will be inoperative, unless it be made *after* the distress has been levied, or at least, authorised or threatened.⁵ § 1005D

§ 1097. Under the Solicitors’ Remuneration Act, 1881, power is granted to any solicitor and his client to contract by an agreement “in writing, signed by the person to be bound thereby or by his agent in that behalf,” respecting the form and amount of remuneration to be paid for professional services rendered in conveyancing or other non contentious business out of court.⁶ Again, under “the Attorneys’ and Solicitors’ Act, 1870,” a solicitor, instead of

S. Devon Ry. Co., 5 H. & N. 875; 3 H. & C. 337, S. C. in Ex. Ch.; Lloyd v. Waterford & Lim. Ry. Co., 15 Ir. Law R., N. S. 37.

¹ 45 & 46 V., c. 61, § 17.

² 1 & 2 W. 4, c. 37, §§ 23, 24. See *Cutts v. Ward*, 2 Law Rep., Q. B. 357; 8 B. & S. 277, S. C.; *Pillar v. Llynvi Coal Co.*, 4 Law Rep., C. P. 752.

³ As to the meaning of the word “lodger,” see *Phillips v. Henson*, L. R., 3 C. P. D. 26; 47 L. J., C. P. 273, S. C.; and *quære* respecting the soundness of that decision. See, also, *Heawood v. Bone*, L. R., 13 Q. B. D. 179.

⁴ 34 & 35 V., c. 97, § 1. It is not clear whether the declaration must be “subscribed” as well as the inventory.

⁵ *Thwaites v. Wilding*, L. R., 12 Q. B. D. 4; 53 L. J., Q. B. 1, S. C.

⁶ 44 & 45 V., c. 44, § 8.

being satisfied with ordinary taxed costs, may make a special agreement with his client "respecting the amount and manner of payment" for his services, whether past or future, provided such agreement be in *writing*, and be signed by both parties,¹ and further that it be pronounced, either by the taxing master or by the court, to be fair and reasonable.² Such an agreement cannot, indeed, be enforced by action,³ but the remuneration agreed upon may, if the terms be fair and reasonable, be recovered in a summary way. An undertaking by a solicitor to "charge nothing if he lost the action," does not fall within these provisions, and need not be in writing.⁴

§ 1098. The Merchant Shipping Act of 1854, among other § 1006 protections which it affords to merchant seamen, enacts, that the master of every ship, except ships of less than eighty tons exclusively employed in the coasting trade, shall enter into an agreement with every seaman whom he carries to sea from any port of the United Kingdom as one of his crew, which agreement must be in a form sanctioned by the Board of Trade,—must be dated at the time of the first signature being attached to it,—must contain a variety of particulars specified in the Act,—and must be signed first by the master and afterwards by the seamen; and the signature of the seaman must be duly attested in the case of a foreign-going ship by a shipping-master, and in the case of a home-trade ship, either by a shipping-master or by some other witness; and in either event, before the seaman executes the instrument, it must be read over and explained to him, or, at least, the witness must ascertain that he understands its meaning.⁵ The same statute also enacts, in § 142, that "in the case of every boy bound apprentice to the sea service by any guardians or over-

¹ Re Lewis, ex p. Munro, L. R., 1 Q. B. D. 724; 45 L. J., Q. B. 816, S. C., nom. ex p. Munro, re Lewis. ² 33 & 34 V., c. 28, §§ 4, 9. ³ § 8.

⁴ Jennings v. Johnson, 8 Law Rep., C. P. 425.

⁵ 17 & 18 V., c. 104, §§ 149, 150, 155; as amended by 36 & 37 V., c. 85, § 7. As to how the agreement is to be attested if the seaman is engaged in a Colonial or foreign port, see §§ 159, 160. As to what attestation is necessary when the agreement is altered by the consent of all parties, see § 163. As to how releases between master and seaman are to be attested and proved, see § 175. As to agreements with sea fishermen and apprenticeships to the sea fishing service, see 46 & 47 V., c. 41, §§ 3—23, and 2nd Sched.

seers of the poor, or other persons having the authority of guardians of the poor, the indentures shall be executed by the boy and the person to whom he is bound in the presence of, and shall be attested by, two justices of the peace, who shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master to whom the boy is to be bound is a proper person for the purpose."

§ 1099. "The Pawnbrokers Act, 1872,"¹ which empowers § 1007 pawnbrokers to make special contracts with pawners in respect of pledges for loans above 40s., provides, in § 24, that, in every such case, the pawnbroker shall deliver a special contract pawn-ticket signed by himself to the pawner, and that the pawner shall sign a duplicate of such ticket.² Again, under the Acts for regulating Hackney and Stage Carriages within the Metropolitan Police Districts of London and Dublin, no proprietor of such carriages can enforce the payment of any sum, claimed from any driver or conductor on account of his earnings, unless under an agreement in writing, which shall have been signed by such driver or conductor in the presence of a competent witness.³

§ 1100. Prior to the year 1855, several of the Acts relating § 1007A to lunatics⁴ required that certain orders and other instruments, which emanated from visitors and justices, should be under their respective *hands and seals*; but as these minute regulations were found to be practically inconvenient, a clause was inserted in the Act of 18 & 19 Vict., c. 105,⁵ which dispensed with the necessity of employing any seal in future, and which even went so far as to provide, that all documents, which under the statutes in question had already been duly signed by a visitor or a justice, should be deemed valid, though no seal had been attached to them.

¹ 35 & 36 V., c. 93.

² These tickets and duplicates are exempt from Stamp Duty, § 24 of the Act.

³ 6 & 7 V., c. 86, § 23; 16 & 17 V., c. 112, § 36, Ir. Under the London Act the agreement requires no stamp. § 23.

⁴ 8 & 9 V., c. 100; 16 & 17 V., cc. 96 & 97.

⁵ § 15.

§ 1101. The Bankruptcy Act and Rules of 1883 contain some regulations respecting the appointment of proxies to act for creditors, and the form of voting letters, which deserve special notice.¹ And first, a general proxy must be either the Official Receiver, or the manager, or clerk, or other person in the regular employ of the creditor;² though a special proxy may be any one whom the creditor thinks fit to name.³ In either case the appointment will not be valid, unless it be in writing, signed by the creditor and attested by a witness.⁴ The instrument must also be in the prescribed form,⁵ and all blanks must be filled up in the creditor's own handwriting.⁶ The agent of a corporation may fill up blanks, and sign for his principals, but he must expressly state that he is "duly authorized under the seal of the company."⁷ Voting letters, which are now available by creditors who have proved their debts, for the purpose of assenting to, or dissenting from, a debtor's or a bankrupt's proposal for a composition or a scheme of arrangement, must be in the prescribed form, and further be signed by the creditors themselves, and be countersigned by a witness.⁸ § 1007B

§ 1101A. Under "The Landlord and Tenant, Ireland, Act, 1870," every notice to quit to be served on a tenant of a holding, must be in writing or print, bearing a half-crown stamp, "and signed by the landlord or his agent lawfully authorized thereunto."⁹

§ 1102. By the Act which governs the registration of persons entitled to vote in the election of members of Parliament, all notices of objection to persons remaining on the list of voters, must be individually signed at the foot of the notice by the person objecting;¹⁰ and if the notice is sent by the post, and the service of § 1008

¹ See Sched. 1 of Act, RR. 15—21; Bkptcy Rules, R. 183, FF. 54, 55.

² Sched. 1 of Act, RR. 17, 21.

³ Sched. 1 of Act, R. 18.

⁴ FF. 54, 55.

⁵ R. 183, and Sched. 1 of Act, R. 16.

⁶ Sched. 1 of Act, R. 16, FF. 54, 55.

⁷ FF. 54, 55.

⁸ 46 & 47 V., c. 52, § 18, subs. 2, and § 23; Bkptcy Rules, R. 183, F. 56.

⁹ 33 & 34 V., c. 46, § 58, Ir.

¹⁰ 6 & 7 V., c. 18, § 7, and Sch. A., No. 4 & 5, as to counties; § 17, Sch. B., No. 10 & 11, as to cities and boroughs; *Toms v. Cuming*, 7 M. & Gr. 88;

it is sought to be established by the production of a duplicate stamped at the Post-office, this duplicate must be personally subscribed, and externally directed, in the same manner as the copy sent.¹ So, under the same Act, notices of intention to prosecute an appeal, whether transmitted to the Central Office of the Supreme Court, or sent to the respondent, must be signed by the appellant himself.² Again, all notices of appeal to any court of general or quarter sessions, other than those against summary convictions, orders of removal, orders under any statute relating to pauper lunatics, orders in bastardy, or any proceedings by virtue of any Act relating to the revenue, must specify in writing the particular grounds of appeal, and be signed by the person giving the same, or his solicitor on his behalf.³

§ 1103. Under the Poor-law Amendment Acts, no pauper can § 1009 be removed from one parish to another, unless by written consent, until twenty-one days after notice of chargeability *in writing*, accompanied by a copy or counterpart of the order of removal, and by a statement of the grounds of removal under the hands of *the overseers or guardians of the parish* obtaining such order, or any *three or more of such guardians*, shall have been sent by them through the post or otherwise to the overseers of the parish to whom such order, shall be directed;⁴ and no appeal can be heard against such order, unless the *overseers or guardians* of the appellant parish, or any *three or more of such guardians*, shall, with a

Pruen v. Cox, 2 Com. B. 1. As to the Irish law, see 13 & 14 V., c. 69, §§ 26 & 36.

¹ 6 & 7 V., c. 18, § 100; *Toms v. Cuming*, 7 M. & Gr. 88; 8 Scott, N. R. 910, S. C.; *Birch v. Edwards*, 5 Com. B. 45; *Lewis v. Roberts*, 11 Com. B., N. S. 23; *Smith v. James*, id. 62. See *Barclay v. Parrott*, 1 Com. B., N. S. 49; *Benesh v. Booth*, 18 Com. B., N. S. 111. See, also, 13 & 14 V., c. 69, § 113, as to the Irish law.

² 6 & 7 V., c. 18, § 62; *Petherbridge v. Ash*, 4 Com. B. 74. See *Rawlins v. West Derby*, 2 Com. B. 72. As to the Irish law, see 13 & 14 V., c. 69, § 75.

³ 12 & 13 V., c. 45, §§ 1 & 2. 47 & 48 V., c. 43, Sch. In *R. v. Js. of Kent*, 8 Law Rep., Q. B. 305, the Court, with very questionable propriety, held that the Statute was complied with though the Notice of Appeal was signed only by the *clerk* of the appellants' attorney. Sed qu. S. C. 42 L. J., M. C. 112.

⁴ 4 & 5 W. 4, c. 76, § 79; 11 & 12 V., c. 31, §§ 2, 9.

notice of appeal, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, have sent or delivered to the overseers of the respondent parish a *statement in writing under their hands* of the grounds of appeal.¹ The notice of appeal, as also the statement of grounds of appeal, may be transmitted through the post;² and the fourteen days will be calculated from the time when, according to the usual course of post, the notice ought to reach the respondents.³

§ 1104. In construing these provisions, the Court of Queen's Bench has held that, although notices of appeal may be signed by the solicitor on behalf of the appellant parish,⁴ notices of chargeability, and statements of grounds of removal and of appeal, must respectively bear the signatures of the overseers or guardians.⁵ They will, however, be valid if signed by a majority of the aggregate body of the overseers and churchwardens;⁶ though they must be signed by at least such a majority.⁷ Still, it is not necessary that the document should show on its face that it proceeds from a majority of the parish officers,⁸ but it is certainly very desirable that this fact should appear.⁹ The guardians mentioned in these clauses are not guardians of a union, but are guardians expressly appointed to act for particular parishes under § 39 of 4 & 5 W. 4, c. 76.¹⁰ As a parish is generally bound by the acts of those persons whom it represents to be its officers, the adverse parish, on a principle of reciprocity, is precluded from disproving the legality of the appointments of such officers, unless the notice signed by them be invalid on its face.¹¹ § 1009

¹ 4 & 5 W. 4, c. 76, § 81.

² 14 & 15 V., c. 105, § 10.

³ *R. v. Slawstone*, 18 Q. B. 388.

⁴ *R. v. Middlesex*, 1 L. M. & P. 621; *R. v. Carew*, id. 626, n.

⁵ *R. v. Derby*, 1 L. M. & P. 660, per Patterson, J.; *R. v. Middlesex*, id. 625, per id.; *R. v. Worcester*, 5 Q. B. 508, n.; *R. v. Surrey*, id. 503.

⁶ *R. v. Warwickshire*, 6 A. & E. 873; 2 N. & P. 153, S. C.; *R. v. Derbyshire*, 6 A. & E. 885.

⁷ *R. v. Westbury*, 5 Q. B. 500.

⁸ *R. v. Colerne*, 11 Q. B. 909.

⁹ *R. v. Westbury*, 5 Q. B. 504, 505.

¹⁰ *R. v. Surrey*, 5 Q. B. 506; *R. v. Lambeth*, and *R. v. Southampton*, id. 513.

¹¹ *R. v. Leominster*, 5 Q. B. 640, 652.

§ 1105. The Metropolis Local Management Act¹ enacts, in § 1009A § 222, that “every notice, demand, or like document given by or on behalf of the Metropolitan Board of Works, or any vestry or district Board under that Act, may be in writing or print, or partly in writing and partly in print, and shall be sufficiently authenticated if signed by their clerk, or by the officer by whom the same is given.”² In like manner it is enacted in § 64 of the Companies’ Act, 1862,³ that “any summons, notice, order, or proceeding requiring authentication by the Company, may be signed by any director, secretary, or other authorised officer of the Company, and need not be under the common seal of the Company, and the same may be in writing or in print, or partly in writing and partly in print.” Similar provisions may be found,—if trouble be taken to look for them,—in a multitude of other statutes.⁴

§ 1106. With respect to warrants and other instruments issuing from the *Treasury*, these may now in all cases be issued under the hands of any *two* or more of the commissioners;⁵ and a like convenient rule has been adopted in reference to all orders and other documents emanating from the Commissioners of Customs.⁶ Again, the rules,

¹ 18 & 19 V., c. 120.

² See *In re Balls & Met. Board of Works*, 7 B. & S. 177.

³ 25 & 26 V., c. 89.

⁴ See, for example, the “Telegraph Act, 1878,” 41 & 42 V., c. 76, § 12.

⁵ 12 & 13 V., c. 89, enacts, that “where any warrant, appointment, authority, approval, instrument, or act whatsoever is by any Act of Parliament or otherwise required to be issued, made, signified, or done by or under the hands of the said Commissioners, or by or under the hands of any three or more of them, every such warrant, appointment, authority, approval, instrument, or act may be issued, made, signified, or done by or under the hands of any *two* or more of the said Commissioners, and when so issued, made, signified, or done as aforesaid, shall be binding and have the same effect to all intents and purposes, as if issued, made, signified, or done by or under the hands of the said Commissioners, or by or under the hands of any three or more of them, as the case may require.”

⁶ 39 & 40 V., c. 36, § 10, enacts, that “every order, document, or instrument required by law to be under the hands of the Commissioners of Customs, but not required to be signed by two or more of them, being attested by the signature of any one of such Commissioners,—and every order, document, or instrument required by any law to be under the hands, or under the hands and seals, of the Commissioners of Customs, being attested by the hands, or the hands and seals, of two or more of such

orders, or regulations of the Local Government Board for England, will be valid if made under seal, and signed by the president or one of the ex-officio members, and countersigned by a secretary or his assistant.¹ On somewhat similar provisions, also, the validity of rules and orders made by the Local Government Board for Ireland,² or by the late Irish Poor Law Commissioners³ will be found to depend.

§ 1107. In considering how and when the signatures rendered § 1011 necessary by these several Acts may be affixed *by procuration*, attention must be paid to the language employed by the Legislature in each particular case. In some cases, as for instance in those which fall within the 7th section of the Statute of Frauds,⁴—the 23rd and 24th sections of the Truck Act,⁵—the third part of the Merchant Shipping Act, 1854,⁶—the 7th, 17th, and 62nd sections of the Voters' Registration Act,⁷—the 24th section of the Pawnbrokers' Act, 1872,⁸—the 23rd section of the English Act, and the 36th section of the Irish Act, for Regulating Metropolitan Public Carriages,⁹—the 6th section of Lord Tenterden's Act,¹⁰—the 4th section of the Sculpture Copyright Act,¹¹—the 14th section of the Real Property Limitation Act, 1833,¹²—and the 7th section of the Real Property Limitation Act, 1874,¹³ it seems to be clear that the *signature of an agent*, however appointed, *will not suffice*. In other

Commissioners,—shall be deemed to be an order, document, or instrument under the hands, or under the hands and seals, as the case may be, of the Commissioners of Customs."

¹ 34 & 35 V., c. 70, § 5.

² 35 & 36 V., c. 69, § 4, Ir.

³ 10 & 11 V., c. 90, §§ 3, 12, 18, Ir., as amended by 19 & 20 V., c. 14, Ir.

⁴ Ante, § 1016.

⁵ Ante, § 1095.

⁶ Ante, § 1098.

⁷ Ante, § 1102.

⁸ Ante, § 1099.

⁹ Id.

¹⁰ Ante, § 1085; Hyde v. Johnson, 2 Bing. N. C. 776; 3 Scott, 289, S. C.; Gibson v. Baghott, 5 C. & P. 211, per Parke, B. Swift v. Jewesbury, 43 L. J., Q. B. 56, per Ex. Ch.; 9 Law Rep., Ch. App. 301, S. C.; overruling Swift v. Winterbotham, 8 Law Rep., Q. B. 244; 42 L. J., Q. B. 111, S. C.

¹¹ 54 G. 3, c. 56, § 4.

¹² Ante, § 1088. See Corp. of Dublin v. Judge, 11 Ir. Law R. 8, where it was held, that an acknowledgment of title signed by a third party for and in the presence of the person in possession, who was too ill to write, was sufficient to satisfy the Act.

¹³ 37 & 38 V., c. 57. Ante, § 1088.

cases, though the paper may be signed by an agent, yet his *authority* to do so must be *evidence in writing*. For instance, this is expressly required in the 1st and 3rd sections of the Statute of Frauds,¹ and also in the 3rd section of the Act relating to copyright in paintings, drawings and photographs.²

§ 1108. In other cases, again, the Legislature, while it allows § 1011 agents to sign the documents, *does not require them to act under any written authority*. Thus, in cases falling within the 4th³ or 17th sections of the Statute of Frauds,⁴—the 1st section of Lord Tenterden's Act, and the 24th section of the corresponding Irish Act, 16 & 17 V., c. 113, as respectively amended by § 13 of the Mercantile Marine Act of 1856,⁵—the 8th section of the Real Property Limitation Act, 1874,⁶—the 7th section of the Railway and Canal Traffic Act, 1854,⁷—the 5th section of the Act of 1833 for the Amendment of the Law,⁸—the 2nd section of the Dramatic Copyright Act,⁹—and the first section of Mr. Baines's Act,¹⁰ an agent authorized merely by parol may sign the respective documents on behalf of his principal; and even though the agent has acted in the first instance without any authority whatever, yet, if the principal by subsequent conduct has recognised and adopted what he has done, this will be sufficient to satisfy the respective statutes.¹¹

§ 1109. The practical effect of these rules,—which rest on no § 1012 principle, but are the result of arbitrary, if not of accidental, legislation,—is in some instances sufficiently absurd. Thus, while no

¹ Ante, §§ 1001, 1003.

² 25 & 26 V., c. 68.

³ See *Heard v. Pilley*, 4 Law Rep., Ch. Ap. 548; 38 L. J., Ch. 718, S. C.; *Cave v. Mackenzie*, 46 L. J., Ch. 564, per Jessel, M. R.

⁴ Ante, §§ 1019, 1020.

⁵ Ante, § 1073.

⁶ 37 & 38 V., c. 57; ante, § 1088.

⁷ 17 & 18 V., c. 31, cited ante, § 1093; *Aldridge v. The G. West. Ry. Co.*, 15 Com. B., N. S. 582, 599; 33 L. J., C. P. 167, per Erle, C. J., S. C.

⁸ Ante, § 1090.

⁹ 3 & W. 4, c. 15; *Morton v. Copeland*, 16 Com. B. 517.

¹⁰ 12 & 13 V., c. 45, ante, § 1102.

¹¹ *Maclean v. Dunn*, 4 Bing. 722; 1 M. & P. 761, S. C.; *Gosbell v. Archer*, 2 A. & E. 500, 507; *Fitzmaurice v. Bayley*, 26 L. J., Q. B. 114; 6 E. & B. 868, S. C.

action can be brought against a man for falsely representing his friend to be a person of substance, unless such representation be in writing signed by himself, any person may be sued on an ordinary guarantee to be answerable for another's debt, if the promise to pay be given in writing by his authorised agent; that is, the latter person unlike the former, is exposed to be charged by the verbal statement of the party actually signing the promise, that he had authority so to sign.¹ So, also, while an agent cannot bind his principal by surrendering a lease not exceeding the term of three years, unless he be duly authorized in writing, he may, under a mere oral authority, enter into a contract for the sale of lands; or for the sale of merchandise above the value of ten pounds.² It may here be added that an *auctioneer*³ is regarded, at the time of the auction,⁴ as the agent of both vendor and purchaser, whether the subject of the sale be lands or goods; and provided the *whole* contract can be made out from the memoranda and entries signed by him, it is sufficient to bind them both.⁵ A broker, too, is generally considered to be the agent of both buyer and seller; but a factor, except under special circumstances, is the agent of the seller alone.⁶

§ 1109A. Before leaving the law which regulates the execution of instruments by procuration, it should be borne in mind, that there is no rule to prevent any man from signing a document in a double capacity, first, as agent for one of the contracting parties, and next,

¹ Lyde v. Barnard, 1 M. & W. 104, per Gurney, B.

² Ante, §§ 1003, 1019, 1020; 1 Sug. V. & P. 186. See 7 M. & W. 343.

³ This rule would not, except under special circumstances (See Bird v. Boulter, 4 B. & Ad. 443), extend to the auctioneer's clerk; Peirce v. Corf, 9 Law Rep., Q. B. 210; 43 L. J., Q. B. 52, S. C.

⁴ But at that time only, Mews v. Carr, 1 H. & N. 484.

⁵ Emmerson v. Heelis, 2 Taunt. 38; White v. Proctor, 4 Taunt. 290; Kenworthy v. Schofield, 2 B. & C. 945; 4 D. & R. 556, S. C.; Wood v. Midgley, 2 Sm. & Gif. 115; Carrigy v. Brock, I. R., 5 C. L. 501; Peirce v. Corf, 9 Law Rep., Q. B. 210; 43 L. J., Q. B. 52, S. C.; Rishton v. Whatmore, L. R., 8 Ch. D. 467, per Hall, V.-C.; 47 L. J., Ch. 629, S. C.; 1 Sug. V. & P. 188—191.

⁶ See Darrell v. Evans, 6 H. & N. 660; S. C. nom. Durrell v. Evans, 30 L. J., Ex. 254; S. C. in Ex. Ch. 31 L. J., Ex. 337; and 1 H. & C. 174. See ante, § 1020, n. 2.

in his own right.¹ Neither is it necessary in such a case that he should sign his name twice over, but the law will be satisfied, if it can be proved by parol evidence that, although apparently signing as a mere agent, he really intended to bind himself as well as his principal.²

§ 1110. Besides the Acts noticed above, and many others of a like nature, which require certain transactions to be evidenced by writing, a cloud of statutes might be mentioned, which, in order to give validity to documents, render it necessary that they should be executed or attested in a particular form.³ It is not here intended to enumerate these statutes; but, before leaving the subject, it may be observed that registers of marriages, whether in this country,⁴ or,—since the 1st of January, 1852,—in India;⁵ assignments⁶ of bail bonds;⁷ the protest by any person other than a notary public, of a bill of exchange, whether such protest be for non-acceptance or non-payment;⁸ memorials of deeds registered under the Middlesex Registration Act;⁹ the deed of a father appointing a guardian of his child;¹⁰ all deeds by which new trustees of property conveyed for religious or educational purposes may now be appointed;¹¹ and conveyances to charitable uses under the Mortmain Act;¹²—must

¹ *Young v. Schuler*, L. R., 11 Q. B. D. 671, per Ct. of App. ² *Id.*

³ As to the mode of executing deeds under powers, see 22 & 23 V., c. 35, § 12.

⁴ 6 & 7 W. 4, c. 85, § 23; 6 & 7 W. 4, c. 86, § 31; 12 & 13 V., c. 68, § 11.

⁵ 14 & 15 V., c. 40, § 11.

⁶ It is now decided, after much vacillation of judgment, that assignments of copyright, though granted before the 1st of July, 1842, when the Act of 5 & 6 V., c. 45, came into operation, do not require to be attested by two witnesses. See *Cumberland v. Copeland*, 1 H. & C. 194; 31 L. J., Ex. 353, S. C., per Ex. Ch. reversing the decision of the Ex. in S. C., 7 H. & N. 118. See, also, *Jefferys v. Boosey*, 4 H. of L. Cas. 815; and *Kyle v. Jeffreys*, 3 Macq. Sc. Cas. H. of L. 617, per Ld. Wensleydale.

⁷ 4 A., c. 16, § 20.

⁸ 45 & 46 V., c. 61, §§ 51, 52, 94, and Sch. 1. These protests, so far as inland bills are concerned, are very unusual, and of little, if any, use. See *Windle v. Andrews*, 2 B. & A. 696; 2 Stark. R. 425, S. C.

⁹ 7 A., c. 20, §§ 1, 5; *R. v. Reg. of Deeds for Middlesex*, 28 L. J., Q. B. 77.

¹⁰ 12 C. 2, c. 24, §§ 8, 9. The guardian himself may be one of the witnesses, *Morgan v. Hatchell*, 24 L. J., Ch. 135, per Romilly, M. R.

¹¹ 13 & 14 V., c. 28, § 3.

¹² 9 G. 2, c. 36, § 1. See *Wickham v. M. of Bath*, 35 L. J., Ch. 5; 1 Law Rep., Eq. 17; 35 Beav. 59, S. C.

respectively be attested by *two* or more credible witnesses. Every lease made under “The Leasing Powers Act for religious worship in Ireland, 1855,” must be “by indenture, sealed and delivered by or on behalf of the lessor in the presence of one or more than one witness;” but, singularly enough, the statute does not require that such witness should attest the instrument by attaching his signature to it.¹ Under the Bills of Sale Acts, 1878 and 1882, “the execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto;”² but, since the 18th of Aug. 1882,—except in the case of an *absolute* bill of sale,³—it is no longer necessary, as it was under the Act of 1878,⁴ that any such witness should be a solicitor.⁵

§ 1111. By the English Debtors’ Act, 1869, and the Irish § 101. Debtors’ Act, 1872, “a *warrant of attorney* to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall not be of any force, unless there is present some [solicitor] of one of the superior courts on behalf of such person, *expressly named by him*, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which [solicitor] shall subscribe his name as a witness to the due execution thereof, and *thereby declare himself to be* [solicitor] *for the person executing the same, and state that he subscribes as such* [solicitor.]”⁶ And no warrant or cognovit executed in any other manner shall be “rendered valid, by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.”⁷ These provisions, which were passed into law by the Legislature, in order to secure to indigent and ignorant defendants due information of the nature and effect of

¹ 18 & 19 V., c. 39, § 10, which enacts also, that “the counterpart of every such lease shall be executed by the lessee thereof.” These words would seem to preclude an agent from executing the counterpart under a power of attorney from the lessee.

² 45 & 46 V., c. 43, § 10; 46 V., c. 7, § 10, Ir.

³ *Casson v. Churchley*, 53 L. J., Q. B. 335; *Swift v. Pannell*, Id., Ch. 341; L. R., 24 Ch. D. 240, S. C.

⁴ 41 & 42 v., c. 31, § 10.

⁵ 45 & 46 V., c. 43, § 10; 46 V., c. 7, § 10, Ir.

⁶ 32 & 33 V., c. 62, § 24; 35 & 36 V., c. 57, § 23, Ir.

⁷ 32 & 33 V., c. 62, § 25; 35 & 36 V., c. 57, § 24, Ir.

the documents they may be called upon to sign, and thus to protect them against the practices of hard designing plaintiffs, are so stringent in themselves, and have been so strictly interpreted by the courts, that it behoves creditors, when seeking to obtain these securities, to take the greatest care that their debtors literally comply with the statutory directions.¹

§ 1112. First, the attesting witness must be an actual solicitor,² though it is not necessary for him to have taken out his certificate.³ Secondly, if the defendant introduces a person as a solicitor, he will be estopped from afterwards denying his character, at least, unless he can clearly show that he acted in ignorance.⁴ Thirdly, the solicitor attending on behalf of the defendant must be some person other than the legal adviser, or the agent of the legal adviser, acting for the plaintiff;⁵ and though the statute does not require that the plaintiff should employ a solicitor, yet as he seldom, in fact, proceeds in these matters without the assistance of one, it ought to be perfectly clear, in the event of a single solicitor being present, that he was acting exclusively on behalf of the defendant.⁶ Fourthly, it is not necessary that the solicitor should be originally or spontaneously named by the defendant, or that he should come to the place of meeting at his request; but if he remains there at the defendant's request, and is clearly and expressly adopted by him as his solicitor, this will suffice, though he may have been introduced by the plaintiff himself, or by his legal adviser.⁷ Still, as an introduction from such a quarter will always be regarded with distrust,

¹ See Mr. Serj. Robinson's "Law of Warrants of Attorney," 34—57.

² *Paul v. Cleaver*, 2 Taunt. 369.

³ *Holgate v. Slight*, 2 L. M. & P. 662.

⁴ *Cox. v. Cannon*, 4 Bing. N. C. 453; 6 Dowl. 625, S. C.; *Jeyes v. Booth*, 1 B. & P. 97; *Wallace v. Brockley*, 5 Dowl. 695; *Price v. Carter*, 7 Q. B. 838.

⁵ *Mason v. Kiddle*, 5 M. & W. 513; S. C. nom. *Mason v. Riddle*, 8 Dowl. 207; *Rising v. Dolphin*, 8 Dowl. 309; *Pryor v. Swaine*, 2 Dowl. & L. 37, per Coleridge, J.; *Hirst v. Hannah*, 17 Q. B. 383.

⁶ *Sanderson v. Westley*, 6 M. & W. 93, 100, per Alderson, B.; 8 Dowl. 412, S. C.; *Cooper v. Grant*, 12 Com. B. 154; *Hirst v. Hannah*, 17 Q. B. 383; *Walsh v. Nally*, 11 C. L. 337.

⁷ *Walton v. Chandler*, 1 Com. B. 306; 2 Dowl. & L. 802, S. C.; *Taylor v. Nicholls*, 6 M. & W. 91, 95; 8 Dowl. 242, S. C.; *Bligh v. Brewer*, 1 C. M. & R. 651; 5 Tyr. 222; 3 Dowl. 266, S. C.; *Oliver v. Woodroffe*, 4 M. & W. 650; 7 Dowl. 166, S. C.; *Pease v. Wells*, 8 Dowl. 626; *Joel v. Dicker*, 5 Dowl. & L. 1; *Nolan v. Gumley*, 14 Ir. Law R., N. S. 301.

and may often, when taken in conjunction with other suspicious circumstances, raise a strong inference of fraud, it is never advisable for a plaintiff or his solicitor to interfere in this manner;¹ and the imprudence of such a course will be more apparent, when it is considered, that in all cases of this kind it must distinctly appear, that the defendant was fully aware of his having an option in the choice of his solicitor, and, moreover, that he had an opportunity of exercising such option, and did in fact exercise it.²

1113. Fifthly, the solicitor is not bound to read over the instrument to his client unless desired to do so; but he attends for the purpose of explaining its nature and effect; and even this explanation may be waived, if the client does not require it.³ Sixthly, the subscription by the witness must be an actual visible subscription; and, therefore, where it became necessary, in consequence of an alteration having been introduced in a warrant of attorney, to re-execute the instrument, and the witness contented himself with retracing his previous attestation and signature with a dry pen, this was not deemed a sufficient compliance with the requisitions of the statute.⁴ Seventhly, the law does not prevent the solicitor to whom the warrant is addressed, and who is therefore entitled to enter up judgment upon it, from acting as solicitor for the defendant to attest the execution.⁵ Lastly, the memorandum of attestation must be drawn with great care, and in it the subscribing witness must distinctly state two things; first, that he is the solicitor of the party executing the instrument, and next, that he subscribes as such. § 1016

§ 1114. No precise form of words is rendered necessary by the Act, but those used must be such as to enable the courts, either directly, or by necessary inference, to collect *both* the above facts.⁶ § 1017

¹ Taylor v. Nicholls, 6 M. & W. 96, per Parke, B.

² Gripper v. Bristow, 6 M. & W. 807, 812; 8 Dowl. 797, S. C.; Barnes v. Pendrey, 7 Dowl. 747; Walker v. Gardner, 4 B. & Ad. 371.

³ Taylor v. Nicholls, 6 M. & W. 95, per Parke, B.; 8 Dowl. 242, S. C.; Oliver v. Woodroffe, 4 M. & W. 651, per Parke, B.; 7 Dowl. 166, S. C.; Joel v. Dicker, 5 Dowl. & L. 1.

⁴ Bailey v. Bellamy, 9 Dowl. 507. See ante, § 1052.

⁵ Levinson v. Syer, 21 L. J., Q. B., Bail. C. 16.

⁶ Per Parke, B., in Hibbert v. Barton, 10 M. & W., 683, 684.

Where, therefore, the attestation was as follows,—"Witness, A. B., defendant's attorney, named by him, and attending at his request;"¹—or, "Signed by the above named M., in the presence of us, of whom the said A. is the attorney expressly named by him, and acting at his request, and by whom the above-written warrant of attorney was read over, and the nature and effect thereof explained to the said M. before the execution thereof by him. A., attorney. B.;"²—or, "Witnessed by me, W., as the attorney of the said N., attending at the execution hereof at his request, and expressly named by him. W. of Prescott, Lancashire;"³—the courts held that the instruments were respectively invalid, as not one of the attestation clauses stated that the witness subscribed as the defendant's attorney. So, where the attestation was in the following form;—"Signed by A. in my presence, and I subscribe myself as attorney for the said A. expressly named by him to attest his execution of these presents;"—it was held, though with some doubt, to be insufficient, as containing no distinct declaration by the attesting witness of his being the attorney for the defendant.⁴

§ 1115. Where, however, the attestation was as follows:— § 1018
 "Signed, sealed, and delivered in the presence of E. F., attorney for the said C. C., and expressly named by him, and attending at his request. And I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him; and I hereby subscribe my name as a witness to the due execution thereof, E. F.;"⁵ and in this form:—"Duly executed by the above named R. G., in the presence of me, the undersigned S. B., attorney on behalf of the said R. G. expressly named by him, and attending at his request; and I do hereby declare that I subscribe my name as witness to the due execution hereof by the said

¹ *Poole v. Hobbs*, 8 Dowl. 113, per Coleridge, J., recognised in 5 Q. B. 184. See, also, *Potter v. Nicholson*, 8 M. & W. 294; 9 Dowl. 808, S. C.

² *Everard v. Poppleton*, 5 Q. B. 181; *Lucey v. Murphy*, 1 R., 7 C. L. 494.

³ *Hibbert v. Barton*, 10 M. & W. 678; 2 Dowl. N. S. 434, S. C. See, also, *Pocock v. Pickering*, 18 Q. B. 789.

⁴ *Elkington v. Holland*, 9 M. & W. 659; 1 Dowl. N. S. 643, S. C.

⁵ *Lewis v. Ld. Kensington*, 2 Com. B. 463.

R. G., and as his attorney, and that previous to the execution hereof by the said R. G., I informed him of the nature and effect hereof. S. B., attorney, Birmingham;”¹—and in this form:—“Signed, sealed, and delived by A. B., in my presence, and I declare myself to be attorney for the said A. B., and that I subscribe my name as such attorney. G. O., solicitor, Merthyr;”² it was held to be sufficient. So, where the witness, after declaring himself to be the defendant’s attorney, added, “and I subscribe myself *accordingly*, A. B.,” the directions of the Act were deemed to have been followed;³ and where the question was, whether the words “of me, M., the attorney of the said N.” satisfied the statute, which required that the witness should “thereby declare himself to be the attorney for the person, &c.,” it was held that they did, both in substance and in form.⁴

§ 1116. Notwithstanding the stringent and comprehensive language of the Act, it seems to be now settled, that where the person executing a warrant of attorney, or cognovit, is *himself a solicitor*, he may dispense with the presence of another solicitor on his behalf; for as solicitors are expressly selected to impart information to others respecting the nature of these instruments, they are presumed to require no advice on such a subject; and not being within the mischief of the statute, its provisions do not apply to them.⁵ But the Act extends to warrants of attorney executed abroad, if sought to be enforced in this country, for the evil, which is intended to be remedied, affects such instruments, equally with those which are executed at home.⁶ The Legislature, apparently by an oversight, has drawn a distinction between warrants of attorney and cognovits; the Act applying equally to all the latter class of instruments, but being confined to such of the former class as relate

¹ Phillips v. Gibbs, 4 Dowl. & L. 275; 16 M. & W. 203, S. C.

² Gay v. Hill, 18 L. J., Q. B., Bail C. 12; 5 Dowl. & L. 422, S. C.; Nolan v. Gumley, 14 Ir. Law R. N. S. 301.

³ Lindley v. Girdler, 1 Dowl. & L. 699, per Patteson, J.

⁴ Knight v. Hasty, 12 Law J., Q. B. Bail. C. 293; recognised in 5 Q. B. 183. See, further, Ledgard v. Thompson, 11 M. & W. 40; 2 Dowl. N. S. 766, S. C.

⁵ Chipp v. Harris, 5 M. & W. 430; Downes v. Garbutt, 2 Dowl. N. S. 939, per Coleridge, J.

⁶ Davis v. Trevanion, 2 Dowl. & L. 743, per Wightman, J.

to personal actions. The result is, that, if a defendant in an action to recover land gives a warrant of attorney to confess judgment, no statutory execution is required;¹ but if he gives a cognovit for the same purpose, it will be set aside unless duly attested in conformity with the Act.²

§ 1117. As the above provisions were made exclusively for the benefit of defendants, third parties, even though prejudiced by warrants of attorney or cognovits having been given by such defendants to other creditors, cannot object to these instruments on the ground that no solicitor attested their execution.³ So, where judgment has been entered up on a warrant of attorney, executed by a principal and his sureties, and one of the sureties has paid the debt and recovered contribution from his co-surety, such co-surety cannot set aside the warrant, and compel the plaintiff to repay him the amount of contribution, on the ground of defective attestation.⁴ § 1020

§ 1119. It may here be convenient to notice briefly a few of the principal statutes, which either require or permit the *enrolment* or registration of particular instruments. And first as to the Acts which render enrolment or registration *necessary*. One of the most important of these is the Mortmain Act,⁵ which enacts that all conveyances to charitable uses shall be void, unless, among other formalities,⁶ they be enrolled in the Enrolment Department of the Central Office,⁷ "within six calendar months next after the execution thereof." This enactment, however, does not apply to any conveyance or assurance of messuages, lands, or hereditaments to or in trust for the overseers of the poor, or the guardians of any parish or union, for the purpose of providing a workhouse or asylum for the accommodation of the poor.⁸ The Clerical Dis- § 1023

¹ Doe v. Kingston, 1 Dowl. N. S. 263, per Patteson, J.

² Doe v. Howell, 13 A. & E. 696.

³ Chipp v. Harris, 5 M. & W. 430. See Pinches v. Harvey, 1 Q. B. 869.

⁴ Price v. Carter, 7 Q. B. 838.

⁵ 9 G. 2, c. 36, §§ 1 & 3. See, also, 24 & 25 V., c. 9; 25 & 26 V., c. 17, 27 & 28 V., c. 13; 29 & 30 V., c. 57; 31 & 32 V., c. 44.

⁶ See ante, § 1110.

⁷ 42 & 43 V., c. 78, § 5; Rules of Sup. Ct., 1883, Ord. LXI., R. I.

⁸ 7 & 8 V., c. 101, § 73.

abilities Act, 1870,¹ contains some special provisions for enrolling deeds of relinquishment executed by parsons.

§ 1120. Under the old Act of 27 H. 8, c. 16, which was ex- § 1024
tended to the Counties Palatine by the statute of 5 El., c. 26, no estate of inheritance, or freehold in any lands, tenements, or hereditaments, can pass by *bargain and sale*, unless such bargain and sale be by deed, enrolled within six months next after its date, either in the Enrolment Department of the Central Office,² or in the county where the land lies before the *custos rotulorum*, and two justices, and the Clerk of the Peace, or any two of them, the Clerk of the Peace being one. Again, with the view of preventing frauds upon creditors by the secret transfer of personal property, every warrant of attorney to confess judgment in any personal action, every *cognovit actionem* given by any person, every judge's order made by consent, and given by a defendant in a personal action, authorising the plaintiff to sign judgment, or issue execution,³ and every bill of sale of personal chattels,⁴—which phrase, it may be noted in passing, will now include fixtures and growing crops when separately assigned or charged,⁵—is rendered void,⁶—unless within twenty-one days after the security or the consent has been given, in the case of a warrant, *cognovit*, or judge's order, or within seven days after execution in the case of a bill of sale,⁷ the instrument, or a true copy thereof, be filed, together with an affi-

¹ 33 & 34 V., c. 91.

² 42 & 43 V., c. 78, § 5; Rules of Sup. Ct., 1883, Ord. LXI., R. 1.

³ 32 & 33 V., c. 62, §§ 26, 27; 3 G. 4, c. 39, §§ 1, 2, 3; 6 & 7 V., c. 66. For the corresponding Irish enactments, see 3 & 4 V., c. 105, § 12, Ir.; 20 & 21 V., c. 60, §§ 334, 335, Ir.

⁴ 45 & 46 V., c. 34, § 8. For a somewhat corresponding Irish enactment, see 42 & 43 V., c. 50, § 8, Ir.; and 46 V., c. 7, § 8, Ir.

⁵ 41 & 42 V., c. 31, §§ 4 & 5; 42 & 43 V., c. 50, § 4, Ir.; 46 V., c. 7, § 6, Ir. As to the old law so far as it related to growing crops, see *Branton v. Griffiths*, L. R., 2 C. P. D. 212, per Ct. of App.

⁶ See *Acraman v. Herniman*, 16 Q. B. 998; *Farrow v. Mayes*, 18 Q. B. 516; *Bryan v. Child*, 5 Ex. R. 368.

⁷ The registration of every bill of sale must now be renewed every five years, under the authority of 41 & 42 V., c. 31, § 11; 42 & 43 V., c. 50, § 11, Ir.

davit¹ of the time when it was executed or given, in the Bills of Sale Department of the Central Office.²

§ 1121. All deeds and instruments, whereby any estates or hereditaments shall be purchased, sold, leased, charged, or exchanged under the authority of any Act relating to the possessions and land revenues of the Crown, must be enrolled, within six months after their several dates, in the office of Land Revenue Records and Enrolments.³ Similar enactments are contained in the statutes which respectively relate to the possessions of the Duchy of Cornwall,⁴ and to the possessions of Her Majesty in respect of the Duchy of Lancaster;⁵ but the instruments requiring enrolment under these Acts must be enrolled in the offices of the respective duchies. § 1025

§ 1122. The Act for the Abolition of Fines and Recoveries⁶ § 1026 enacts, in § 41, that no assurance, by which any disposition of lands shall be effected under that Act by a tenant in tail, except a lease not exceeding twenty-one years at a rent not less than five-sixths of a rack-rent, shall have any operation by virtue of the Act, unless it be enrolled in what is now called the Enrolment Department of the Central Office⁷ within six calendar months after its execution; while § 46 provides, that the consent of a protector to the disposition of a tenant in tail shall, if given by a distinct deed, be void, unless the deed be enrolled either at or before the time when the assurance by the tenant in tail shall be enrolled.⁸

¹ As to what the affidavit must contain, see *Jones v. Harris*, 41 L. J., Q. B. 6; 7 Law Rep., Q. B. 157, S. C.; *Murray v. Mackenzie*, 10 Law Rep., C. P. 625; 44 L. J., C. P. 313, S. C.; *Blount v. Harris*, 47 L. J., Q. B. 596; S. C. affd. on App., 48 L. J., Q. B. 159; and L. R., 4 Q. B. D. 603; *Castle v. Downton*, L. R., 5 C. P. D. 56; and cases there cited.

² 42 & 43 V., c. 78, § 5; Rules of Sup. Ct. 1883, Ord. LXI., R. 1.

³ 10 G. 4, c. 50, § 63; 2 W. 4, c. 1, § 21; 14 & 15 V., c. 42, § 6.

⁴ 26 & 27 V., c. 49, §§ 30—33; 7 & 8 V., c. 65, §§ 30—36; 11 & 12 V., c. 83, § 6.

⁵ 11 & 12 V., c. 83, § 14.

⁶ 3 & 4 W. 4, c. 74.

⁷ See 42 & 43 V., c. 78, § 5; Rules of Sup. Ct. 1883, Ord. LXI., R. 1.

⁸ See, also, §§ 49, 51, 52, & 59 of 3 & 4 W. 4, c. 74, for further provisions respecting enrolment.

§ 1125. In 1855, a clause was introduced in the Purchasers' § 1028A Protection Act,¹ which enacts in substance, that no annuity or rent-charge, otherwise than by marriage settlement,² for life or lives, or for any term or estate determinable on life or lives, shall affect any hereditaments as to purchasers, mortgagees, or creditors, unless a memorandum containing the name, residence, and description of the person whose estate is intended to be affected, and the date of the instrument, and the annual sum payable, be left for registration in the Enrolment Department of the Central Office.³ Notwithstanding the precise language employed in this enactment, it has been held by the Court of Appeal,—in opposition to a clear opinion expressed by Sir George Jessel, and a doubt entertained by Lord Justice Bramwell,—that an unregistered annuity-deed may still be enforced as against any subsequent incumbrancer or purchaser who may have taken with notice of its existence.⁴

§ 1126. Under the Act relating to solicitors, read in conjunction § 1029 with the Rule of the 2nd Nov. 1875, on the same subject,⁵ the written contract between the articulated clerk and the solicitor to whom he is bound, must be enrolled with the clerk of the Petty Bag, within six months after its date together with an affidavit to be made by the solicitor, verifying the fact of the deponent having been duly admitted, and the further fact of the articles having been duly executed.⁶

§ 1127. The principal statutes which *permit*⁷ enrolments to be § 1030 made, are—1st, the Act of 2 & 3 A., c. 4, which was amended by 5 A., c. 18, and which provides that a memorial of all deeds,*

¹ 18 & 19 V., c. 15, § 12.

² Annuities and rent-charges given by will are also excluded from the provision. See § 14 of the Act.

³ The words of the Act are, "with the senior Master of the Court of Common Pleas."

⁴ *Greaves v. Tofield*, L. R., 14 Ch. D. 563; 50 L. J., Ch. 118, S. C.

⁵ Rule "as to custody of rolls and documents."

⁶ 6 & 7 V., c. 73, §§ 8, 20; 29 & 30 V., c. 84, § 12, *Ir.*

⁷ See *Agra Bk. v. Barry*, L. R., 7 H. L. 155; and in *re Lambert's Estate*, 13 L. R., *Ir.* 234, 241, per Ct. of App., as to the prejudicial results which may occur to any man who, having an instrument capable of registration in a registry county, omits to register it.

* The four acts first named in this section, which relate to the registration of documents in Yorkshire, are now repealed, as from the 1st Jan. 1885, by "The Yorkshire Registries Act," 1884, 47 & 48 V., c. 54, § 51. See that Act mentioned in notes to §§ 1645, 1648, 1654, & 1840.

conveyances,¹ and wills concerning any houses, manors, lands, tenements, or hereditaments in the West Riding of Yorkshire, may, at the election of the parties concerned, be registered; 2nd, the Act of 6 A., c. 35, which contains similar provisions with respect to the East Riding;² 3rd, the Act of 8 G. 2, c. 6, which applies to the North Riding; 4th, the Act of 7 A., c. 20,³ which was amended by 25 G. 2, c. 4, and is applicable to Middlesex; 5th, the Act of 6 A., c. 2, Ir., which governs the registration of deeds, &c., in Ireland;⁴ 6th, the Charitable Trusts Act, 1855, which enacts, that any deed, will, or document relating to any charity may be enrolled in the office of the Charity Commissioners, and may be proved by copies certified under the hand of the secretary or one of the Commissioners;⁵ and 7th, the Act of 3 & 4 W. 4, c. 87, which,—after reciting that by divers Acts of Inclosure the awards of the Commissioners are required to be enrolled, but that such enrolments have in many instances been omitted,—goes on to enact, that the awards not enrolled shall still be valid, but that the parties interested may enrol them if they think proper.⁶

¹ These words are not confined to instruments under seal. In *re Wight's Mortgage Trusts*, 43 L. J., Ch. 66, per Malins, V.-C.; 16 Law Rep., Eq. 41, 47, S. C. They extend to a further charge in favour of a first mortgagee of land, *Credland v. Potter*, 10 Law Rep., Ch. App. 8. See n. 2, *infra*.

² See *Chadwick v. Turner*, 35 L. J., Ch. 349, per Lds. Js.; 1 Law Rep., Ch. App. 310, S. C.

³ Under this Act, an instrument charging lands in Middlesex, though it be not a deed, ought to be registered; *Neve v. Pennell*, 2 New R. 508, per Wood, V.-C.; 2 Hem. & M. 170, 186, S. C.; *Moore v. Culverhouse*, 27 Beav. 639. See n. 1, *supra*.

⁴ See *Carlisle v. Whaley*, 2 Law Rep., H. L. 391.

⁵ 18 & 19 V., c. 124, § 42, enacts, that “any deed, will, or document relating to any charity, may be enrolled by the Board in books to be provided and kept by them for that purpose at their office, and a copy of any such deed, will, or document made from such books, and certified under the hand of the secretary, or one of the Commissioners, shall be received as evidence of the contents of the same deed, will, or document.”

⁶ §§ 1 & 2.

CHAPTER XIX.

ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT WRITTEN
INSTRUMENTS.

§ 1128. PERHAPS the most difficult branch of the law of evidence § 1031 is that which regulates the *admissibility of extrinsic parol testimony to affect written instruments*. In proceeding to discuss the rules of law connected with this subject, it will be well to advert to one or two established principles, which govern the interpretation of all writings. And first, in order to put a just construction upon the language of any document, the court must *read the whole* of it, and must determine the meaning of the words employed in the passage under discussion, not only by a careful examination of the immediate context, but also by considering the sense in which the same words have been used in other parts of the instrument.¹ For it is obvious that the language of a particular passage may be capable of bearing a wider or narrower signification, when read in connexion with other parts of the instrument where the same language is employed, than it would have borne, had no such reflected light been thrown upon it. For instance, suppose a question to arise respecting the meaning of the word "close" as used in a will. If this expression were only to occur once, evidence would be admissible to show, that, in the county where the property was situate, it denoted a farm; but if the word were found in other parts of the will, in any one of which this enlarged meaning could not be applied to it, such evidence would be clearly rejected, as the court would then see that the testator had used the word in its ordinary sense, as denoting an enclosure.² So the word "month," which denotes at law a lunar month, may be shown by the context to mean a calendar month, and the judge will in such case adopt that con-

¹ *Blundell v. Gladstone*, 11 Sim. 486; 1 Phill. 279, 283, 289, S. C.; *Bateman v. Ld. Roden*, 1 Jones & Lat. 356, 368—370, per Sugden, C.

² *Richardson v. Watson*, 4 B. & Ad. 787, 799, per Parke, J.; 1 N. & M. 575, S. C.

struction.¹ So, when words used in the operative part of a deed are of doubtful import, the recitals and other parts of the instrument will often furnish an excellent test for discovering the real intention of the parties, and will enable the court to fix the true meaning of the language employed.²

§ 1129. Again, if the point at issue were whether a legacy, given by a codicil to a legatee under the will, should be regarded as cumulative or substitutionary, the court would certainly be justified in looking, not only to other parts of the same codicil, but to bequests in other later testamentary instruments; and if it should appear that, in these later codicils, the testator had used the words “in addition,” when making bequests to other parties which were intended to be cumulative, the absence of these words, or of expressions of equivalent import, in regard to the legacy in question, would be a circumstance, though far short of conclusive, yet tending to show, in connexion with other facts and arguments, that the later legacy was intended not to be additional, but in substitution. The court, in such a case, would be bound to carry back and apply to the first codicil the knowledge it had acquired by examining the language of the later bequests.³ § 1032

§ 1130.⁴ If the instrument consists partly of a printed formula, and partly of written words, and any reasonable doubt is felt as to the meaning of the whole, the *written words* are entitled to have *greater effect* in the interpretation, than those which are printed;⁵ they being the immediate language selected by the parties themselves for the expression of their meaning, while the *printed formula* is more general in its nature, applying equally to their case, and to that of all other contracting parties on similar subjects and occasions.⁶ § 1033

¹ Lang v. Gale, 1 M. & Sel. 111; R. v. Chawton, 1 Q. B. 247. See ante, § 16.

² Walsh v. Trevanion, 15 Q. B. 733, 751; Pallikelagatha Marcar v. Sigg, 1 Cowell's Ind. App. 83, 100.

³ Lee v. Pain, 4 Hare, 218—221, 236, per Wigram, V.-C.; Russell v. Dickson, 2 Dru. & War. 139, per Sugden, C.; Darley v. Martin, 13 Com. B. 684.

⁴ Gr. Ev. § 278, almost verbatim.

⁵ This rule is embodied in the N. York Civ. Code, § 1695.

⁶ Per Ld. Ellenborough, in Robertson v. French, 4 East, 136, Gumm v. 9 LAW OF EVID.—V. III. (3831)

§ 1131. Next, the terms of every document must, in the absence of all parol testimony, be construed in their *primary* sense, unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, they must be understood in some other and peculiar sense.¹ But it may be said, what is the primary sense of a word? and this is a question which, in some cases, may be more easily asked than answered.² It may, however, be stated generally, that if the language be technical or scientific, and be used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning;³ but if, on the other hand, the expressions have reference to the common transactions of life, they will be interpreted according to their plain, ordinary, and popular meaning.⁴

Tyrie, 33 L. J., Q. B. 108, per Crompton, J., and 111, per Blackburn, J. See *Jessel v. Bath*, 36 L. J., Ex. 149; 2 Law Rep., Ex. 267, S. C.

¹ *Robertson v. French*, 4 East, 135, 136, per Ld. Ellenborough; *Mallan v. May*, 13 M. & W. 517, per Pollock, C. B.; *Carr v. Montefiore*, 5 B. & S. 408, 428; *Ford v. Ford*, 6 Hare, 490, 491, per Wigram, V.-C.; *Hicks v. Sallitt*, 23 L. J., Ch. 571, 578, per Wood, V.-C.; *Boorman v. Johnson*, 12 Wend. 573. See, also, *Rhodes v. Rhodes*, L. R., 7 App. Cas. 192; 51 L. J., Pr. C. 53, S. C.; *Gray v. Pearson*, 6 H. of L. Cas. 106, per Ld. Wensleydale; *Abbott v. Middleton*, 7 id. 68, 115, per id.; *Slingsby v. Grainger*, id. 283, 284, per id.; *Wing v. Angrave*, 8 id. 215, per id.; *Gordon v. Gordon*, 5 Law Rep., H. L. 254; *Ex p. Walton*, re Levy, 50 L. J., Ch. 657, 659, per Jessel, M. R.; L. R., 17 Ch. D. 750, 751, S. C. See *Bathurst v. Errington*, L. R., 2 App. Cas. 698, per Dom. Proc.

² See *Doe v. Perratt*, 6 M. & Gr. 314, where the judges, in delivering their opinions in Dom. Proc., differed widely upon the question, as to whether the word "heir" in a will was to be construed in its technical or popular sense. See, also, *Wells v. Wells*, 43 L. J., Ch. 681, where Jessel, M. R., held, in opposition to some authorities, that "nephew" meant blood nephew, and did not include the son of a husband's sister; S. C., 18 Law Rep., Eq. 504. See, also, *Merrill v. Morton*, 50 L. J., Ch. 249, per Malins, V.-C.; L. R., 17 Ch. D. 382, S. C.

³ *Shore v. Wilson*, 9 Cl. & Fin. 525, per Coleridge, J.; *Doe v. Perratt*, 6 M. & Gr. 342, per Parke, B.

⁴ *Robertson v. French*, 4 East, 135, per Ld. Ellenborough; *Shore v. Wilson*, 9 Cl. & Fin. 565, per Tindal, C. J. The rules for the interpretation of wills, laid down by Sir J. Wigram in his able treatise on that subject, may be safely applied, mutato nomine, to all other private instruments. They are contained in seven propositions, as the result both of principle and authority, and are thus expressed:—"I. A testator is always presumed to use the words, in which he express himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense, in which he thus appears to have used them, will be the sense in which they are to be construed. II. Where there is nothing in the context of a will, from which it is apparent

§ 1132. Bearing the above principles in mind, the first general rule which it will be necessary to notice, respecting the admissibility of extrinsic evidence to effect what is in writing is, that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument.*¹ This rule of the law, that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable. IV. Where the characters in which a will is written are difficult to be decyphered, or the language of the will is not understood by the court, the evidence of persons skilled in decyphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property, which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence of *intention*, to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (i. e. *person* or *thing* intended) is described in terms, which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator." Wigr. Wills, 10—13.

¹ Goss v. Ld. Nugent, 5 B. & Ad. 64, 65; Wigr. Wills, 5; 2 Ph. Ev. 350. So,

common law, which may be traced back to a remote antiquity, is founded on the obvious inconvenience and injustice that would result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls, "the uncertain testimony of slippery memory."¹ When parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, or, in other words, a complete contract,² it is only reasonable to presume, that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong.³

§ 1133. Independent, too, of all considerations of convenience, § 1036 the Legislature has, by positive enactment, adopted the same rule in several cases as an arbitrary and absolute one; and by requiring certain dispositions of property, and other transactions, to be evidenced by writing,—as, for instance, wills, contracts within the Statute of Frauds, and the like,⁴—has rigidly excluded all parol testimony tending to vary the terms contained in the written instrument.⁵ But though the statutory rule will perhaps be more strictly enforced than that which rests on the common law alone, because, in the former case, to relax the rule in any degree, is to the like

by the Scotch law, "a writing cannot be cut down or taken away by the testimony of witnesses," Tait, Ev. 326, 327; 1 Dickson, Ev. 92, et seq., 118; *Inglis v. Buttery*, L. R., 3 App. Cas. 552, H. L. (Sc.).

¹ Lady Rutland's case, 5 Rep. 26 a, 1st Res.

² See *Johnson v. Appleby*, 43 L. J., C. P. 146.

³ *Preston v. Merceau*, 2 W. Bl. 1249; *Rich v. Jackson*, 4 Br. C. C. 519, per Ld. Thurlow; *Adams v. Wordley*, 1 M. & W. 374; *Parteriche v. Powlet*, 2 Atk. 383, per Ld. Hardwicke; *Bogert v. Cauman*, Anthon, R. 70; *Bayard v. Malcolm*, 1 Johns. 467, per Kent, C. J.

⁴ See ante, § 986, et seq.

⁵ Wigr. Wills, 4, 6—8, 125, 126.

extent to repeal the particular Act which renders the writing necessary;¹—yet, at the present day, it seems to be generally admitted as indisputable law, that the term, “written instrument,” as used in the rule, includes not only records, deeds, wills, and other instruments required by the statute or common law to be in writing, but every document, which contains the terms of a *contract* between different parties, and is designed to be the repository and evidence of their final intentions.²

§ 1134. To other less formal documents the rule does not extend; and, therefore, a receipt, except in some few special cases,³ is not conclusive evidence of the payment therein acknowledged to have been made, but the party signing it may invalidate its effect by oral evidence, not only of fraud, but of mistake or surprise on his part; and in short, the document, like any verbal statement made by a person, and afterwards given in evidence to affect him, amounts only to *prima facie* proof, and is capable of being explained.⁴ So, an order for goods, insufficient to satisfy the Statute of Frauds, or a loose memorandum, which does not seem to have been intended by the parties to contain the terms of their contract, will not exclude parol evidence on that subject. For instance, where the defendant, having ordered goods by an unsigned letter, which did not mention any time for payment, afterwards accepted the goods which the plaintiff forwarded to him with the invoice, the court held, in an action for their price, that parol evidence was admissible to show that the goods were really supplied on a credit, which had not expired at the commencement of the suit.⁵ So,

¹ Wigr. Wills, 4, 6—8, 125, 126; *Miller v. Travers*, 8 Bing. 250, 251; *Doe v. Hiscocks*, 5 M. & W. 369; *Clayton v. Ld. Nugent*, 13 M. & W. 205, per Alderson, B., 208, per Rolfe, B.

² *Woolam v. Hearn*, 7 Ves. 218, per Sir W. Grant; *Shore v. Wilson*, 9 Cl. & Fin. 540, per Williams, J.; *Stackpole v. Arnold*, 11 Mass. 31, per Parker, J.; *Hunt v. Adams*, 7 Mass. 522, per Sewell, J.

³ See ante, §§ 96, 845.

⁴ *Farrar v. Hutchinson*, 9 A. & E. 341, 643; 1 P. & D. 437, S. C.; *Skaife v. Jackson*, 3 B. & C. 421, *Lee v. Lanc. & Yorks. Ry. Co.* 6 Law Rep., Ch. App. 527; *Wallace v. Kelsall*, 7 M. & W. 273, 274; *Fuller v. Crittenden*, 9 Conn. 406.

⁵ *Lockett v. Nicklin*, 2 Ex. R. 93. See § 1151, post.
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where a plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and shortly after the purchase was completed, the defendant gave him a paper in the following form:—"Bought of A. B., a horse for 7*l.*—A. B.,"—the court, in an action for breach of warranty, held that the plaintiff might prove the warranty by parol evidence, as the paper appeared to have been meant merely as a memorandum of a transaction, or an informal receipt for the money, and not as containing the terms of the contract itself.¹ So, where a person, after having agreed to hire a horse, had given the owner a card, on which he had written in pencil, "six weeks at two guineas, W. H.," the owner was allowed to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, but an additional term of the contract, namely, that all accidents occasioned by the shying of the horse should be at the risk of the hirer.² Again, in the sale of a chattel under the value of 10*l.*, an auctioneer is not bound by the description of the article contained in the unsigned printed catalogue; but if, when the article was put up to auction, he publicly stated in the hearing of the purchaser that the description was incorrect, he will be entitled to a verdict for the price on giving parol proof of such statement.³

§ 1135. Having thus pointed out the class of written instru- § 1038
ments to which the rule applies, it may next be observed that the rule does not prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter.⁴ Still less, as will presently be shown,⁵ does the rule exclude evidence of an oral agreement, which constitutes a condition on which

¹ *Allen v. Pink*, 4 M. & W. 140, 143, 144; 6 Dowl. 668, S. C.

² *Jeffery v. Walton*, 1 Stark. R. 267. For other instances, see ante, § 406.

³ *Eden v. Blake*, 13 M. & W. 614. As to examinations of prisoners, see ante, §§ 893, 894.

⁴ *Lindley v. Lacey*, 17 Com. B., N. S. 578; 34 L. J., C. P. 7, S. C.; *Morgan v. Griffith*, 6 Law Rep., Ex. 70; 40 L. J., Ex. 46, S. C. See post, § 1147. See, also, *Brady v. Oastler*, 3 H. & C. 112; *Malpas v. Lond. & S. W. Ry. Co.*, 35 L. J., C. P. 166; 1 Law Rep., C. P. 336; and 1 H. & R. 227, S. C.

⁵ P. 967, n. 4.

the performance of the written agreement is to depend.¹ Again, the rule is not infringed by the admission of parol evidence, under the proper pleading, showing that the instrument is altogether *void*, or that it *never* had any *legal* existence or binding force, either by reason of forgery or fraud, or for the illegality of the subject-matter, or for want of due execution and delivery.² For instance, —to illustrate the last ground of invalidity first,—it may be shown by parol evidence, either that an instrument, apparently executed as a deed, had really been delivered simply as an escrow,³ or that a document signed as an agreement, had not been intended by the parties to operate as a present contract, but that it was meant to be conditional on the happening of an event which had never occurred.⁴ *Fraud* practised by the party seeking the remedy upon him against whom it is sought, and in that which is the subject-matter of the action or claim, is universally held fatal to his title. “The covin,” says Lord Coke, “doth suffocate the right.”

§ 1136. It matters not, in this respect, whether the foundation of the claim be a record,⁵ a deed, or a writing without seal; for in either case the instrument will be void—or, to speak more correctly, will be *voidable* at the option of the injured party,⁶—if obtained by fraud, and the fraud may be established by parol evidence.⁷ Thus, § 1038

¹ *Lindley v. Lacey*, 17 Com. B., N. S. 587, and 34 L. J., C. P. 9 per Byles, J., referring to cases cited, *infra*, n. 4.

² *Collins v. Blantern*, 2 Wils. 341; 1 Smith, L. C., 310—339, S. C., and cases there cited in the notes; *Paxton v. Popham*, 9 East, 421, 422, per Ld. Ellenborough.

³ *Murray v. Ld. Stair*, 2 B. & C. 82; 3 D. & R. 278, S. C.

⁴ *Pym v. Campbell*, 25 L. J., Q. B. 277; 6 E. & B. 370, S. C.; *Davis v. Jones*, 17 Com. B. 625. See, also, *Wallis v. Littell*, 31 L. J., C. P. 100; 11 Com. B., N. S. 369, S. C.; *Rogers v. Hadley*, 32 L. J., Ex. 241; *Gudgen v. Besset*, 26 L. J., Q. B. 36; 6 E. & B. 986, S. C. The same doctrine applies to wills, though it must be used with very great caution; *Lister v. Smith*, 33 L. J., Pr. & Mat. 29; 3 Swab. & Trist. 282, S. C.

⁵ See post, § 1713.

⁶ *Urquhart v. Macpherson*, 3 App. Cas. 831, Pr. C.; *Clarke v. Dickson*, E. B. & E. 148.

⁷ *Tait*, Ev. 327, 328; *Buckler v. Millerd*, 2 Ventr. 107; *Filmer v. Gott*, 4 Br. P. C. 230; *Robinson v. Ld. Vernon*, 29 L. J., C. P. 135; 7 Com. B.; N. S. 231, S. C.; *Rogers v. Hadley*, 32 L. J., Ex. 241; 2 H. & C. 227, S. C.; *Taylor v. Weld*, 5 Mass. 116, per Sedgwick, J.; *Franchot v. Leach*, 5 Cowen, 508; *Dorr v. Munsell*, 13 Johns. 431; *Morton v. Chandler*, 8 Greenl. 9; *Com. v. Bullard*, 9 Mass. 270.

if a person has been induced by verbal fraudulent statements to enter into a written contract for the purchase of a house, a ship, or the like, it is competent for him, in an action for a deceitful representation, to prove the fraud by evidence aliundè, though the written contract or the deed of conveyance is silent on the subject to which the fraudulent representations refer.¹ So, the representation of a vendor respecting some particular quality of the article sold, may be given in evidence, if the purchaser has thereby been fraudulently prevented from discovering a fault which the vendor knew to exist.² The declarations, too, of a testator are admissible to show his intentions, if the will be impeached on the ground of fraud, circumvention, or forgery;³ and similar evidence will be received with the view of rebutting the presumption, that an alteration, or interlineation, apparent on the face of the will, was made after its execution.⁴ For this last purpose, however, the declarations of the testator must have been made before the writing was executed, though it matters not whether the instrument be, or be not, a holograph will.⁵

§ 1137.⁶ Parol evidence may also, under the proper pleading, § 1039 be offered to show that the contract was made for the furtherance of objects forbidden, either by statute, or by common law;⁷ or that the writing was obtained by duress;⁸ or that the party was incapable of contracting by reason of some legal impediment, such

¹ *Dobell v. Stephens*, 3 B. & C. 623; 5 D. & R. 490, S. C.; *Wright v. Crookes*, 1 Scott, N. R. 685, 698; *Hotson v. Browne*, 30 L. J., C. P. 106; 9 Com. B., N. S. 442, S. C.

² *Kain v. Old*, 2 B. & C. 634, per Abbott, C. J.

³ *Doe v. Hardy*, 1 M. & Rob. 525; *Doe v. Allen*, 8 T. R. 147.

⁴ *Doe v. Palmer*, 16 Q. B. 747; *In re Duffy*, I. R., 5 Eq. 506; *Dench v. Dench*, 46 L. J., Pr. & Mat. 13; L. R., 2 Pr. D. 60, S. C.

⁵ *Id.* See *In re Hardy*, 30 L. J., Pr. & Mat. 142; *Staines v. Stewart*, 31 L. J., Pr. & Mat. 10; 2 Swab & Trist. 320, S. C. *In re Ripley*, 1 Swab. & Trist. 268; *Johnson v. Lyford*, 37 L. J., Pr. & Mat. 65; 1 Law Rep., P. & D. 546, S. C.

⁶ Gr. Ev. § 284, in part.

⁷ *Collins v. Blantern*, 2 Wils. 347; 1 Smith, L. C. 310, 326, S. C.; *Benyon v. Nettleford*, 3 M. & Gord. 94. See, also, *Biggs v. Lawrence*, 3 T. R. 454; *Waymell v. Reed*, 5 T. R. 600; *Doe v. Ford*, 3 A. & E. 649; *Sinclair v. Stevenson*, 1 C. & P. 582; *Norman v. Cole*, 3 Esp. 253.

⁸ 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig., Plead. 2, W. 18—23.

as infancy, coverture,¹ idiotey, insanity, or intoxication;² or that the instrument came into the hands of the plaintiff without any absolute and final delivery by the obligor or party charged.³

§ 1138. The want or failure of consideration may also be proved by parol evidence, showing that the written agreement is not binding;⁴ unless it be under seal, which, in the absence of fraud, is conclusive evidence of a sufficient consideration.⁵ But further, if no consideration, or a mere nominal consideration, be stated in the deed, the party will be allowed to prove a real substantial consideration by extrinsic evidence;⁶ and if the deed is expressed to be made "for divers good considerations," it may be averred and proved by parol that the bargainee gave money for his bargain.⁷ The onus, however, of proving the consideration will, in such a case, lie on the party claiming under the deed; for the mere statement in the operative part of an instrument that it was made for good and valuable consideration will not suffice to raise a presumption, as against parties disputing the validity of the deed, that any substantial consideration has ever in fact been given.⁸ Again, if an instrument under seal specifies any particular consideration, as, for instance, love and affection, and omits all mention of any other consideration, no extrinsic proof of another can in general be given, because such proof would contradict the deed.⁹ Still, if the object be to establish or negative the existence of fraud, such proof will be admissible. Thus, where a conveyance purported to have been made in consideration of 10,000*l.*, and natural love and

¹ 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig., Plead. 2, W. 18—23.

² B. N. P. 172; *Barrett v. Buxton*, 2 Aik. 167, per Prentiss, J.

³ B. N. P. 172; *Clark v. Gifford*, 10 Wend. 310; *U. S. v. Leffler*, 11 Pet. 86.

⁴ *Foster v. Jolly*, 1 C. M. & R. 707, 708; *Solly v. Hinde*, 2 C. & M. 516; *Abbott v. Hendricks*, 1 M. & Gr. 791, 794—796, ante, § 1023.

⁵ Ante, § 86.

⁶ *Leifechild's case*, 1 Law Rep., Eq. 231, per Kindersley, V.-C.; *Peacock v. Monk*, 1 Ves. Sen. 128.

⁷ 2 Ph. Ev. 353; *Tull v. Parlett*, M. & M. 472, per Tindal, C. J.

⁸ *Kelson v. Kelson*, 10 Hare, 385, per Wood, V.-C.

⁹ *Peacock v. Monk*, 1 Ves. Sen. 128, per Ld. Hardwicke; cited by Alderson, B., in *Gale v. Williamson*, 8 M. & W. 408. But see *Clifford v. Turrell*, 1 Y. & C., Ch. R. 138; 9 Jur. 633, S. C. on appeal.

affection, the court, in a suit to set it aside, admitted extrinsic evidence to show that the estates were worth 30,000*l.*, and that natural love and affection constituted no part of the real consideration.¹ So, where a father assigned his house and personalty to his son by deed, "in consideration of natural love and affection," and afterwards the sheriff seized part of the personalty under a *fi. fa.* against the father, the son, in proceeding against the sheriff, was permitted to give evidence of a valuable consideration, and thus to rebut the presumption of fraud against creditors, which a deed, made by a debtor in consideration of natural love and affection, *prima facie* imports.²

§ 1139. The courts will also, on equitable grounds, sometimes admit parol evidence to contradict or vary a writing, where, by some *mistake in fact*,³ it speaks a different language from what the parties intended; and where, consequently, it would be unconscientious or unjust to enforce it against either party according to its expressed terms. In all cases, however, of this kind, the party seeking relief undertakes a task of great difficulty, since the court will not interfere, unless it be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected.⁴ A *plaintiff* may seek this equitable relief by commencing an action, either to *reform* the writing,—in which event it will be necessary, except under very special circumstances,⁵ to satisfy the court that the mistake was made on *both* sides;⁶ or to *rescind* the instrument, § 1041

¹ *Filmer v. Gott*, 7 Br. P. C. 70; cited by Ld. Kenyon in *R. v. Scammonden*, 3 T. R. 475, 476.

² *Gale v. Williamson*, 8 M. & W. 405, 409—411; *Pott v. Todhunter*, 2 Coll. 76, 84. See 13 El. c. 5.

³ See *Hunt v. Rousmanier*, 8 Wheat. 211, et seq.; *Price v. Ley*, 4 Giff. 235.

⁴ *M. of Townsend v. Strangroom*, 6 Ves. 339; *Mortimer v. Shortall*, 2 Dru. & War. 371, per Sugden, C.; *Bold v. Hutchinson*, 5 De Gex, M. & G. 558; *Wright v. Goff*, 22 Beav. 207, 214; *Ashhurst v. Mill*, 7 Hare, 502; *Gillespie v. Moon*, 2 Johns. Ch. R. 585; *MacCormack v. MacCormack*, 1 R., 11 Eq. 130; 1 L. R., Ir. 119, S. C. on App.; *Welman v. Welman*, L. R., 15 Ch. D. 570, per Malins, V.-C.

⁵ *Lovesy v. Smith*, L. R., 15 Ch. D. 655, per Denman, J.; 49 L. J., Ch. 809, S. C.

⁶ *Mortimer v. Shortall*, 2 Dru. & War. 372, per Sugden, C.; *Murray v.*

—in which case, though conclusive proof of error or surprise on the plaintiff's part alone will suffice,¹ it must appear that the mistake was one of vital importance.² In either of these cases, if the defendant denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well-nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed.³

§ 1140. A *defendant*, also, against whom a specific performance § 1042 of a written agreement is sought, may insist upon the mistake, and may establish its existence by parol evidence, because he may rely on any matter which shows it to be inequitable to enforce the contract.⁴ But here an artificial distinction must be noticed, which appears to be recognised as undoubted law in the British Courts, and which is this : that though parol evidence may be received

Parker, 19 Beav. 305; *Rooke v. Ld. Kensington*, 2 Kay & J. 753; *Bentley v. Mackay*, 31 Beav. 143, 151, per Romilly, M. R.; 4 De Gex, F. & J. 279, S. C.; *Sells v. Sells*, 29 L. J., Ch. 500; 1 Drew. & Sm. 42, S. C.; *Fowler v. Fowler*, 4 De Gex & J. 250; *Elwes v. Elwes*, 2 Giff. 545; 3 De Gex, F. & J. 667, S. C.; *Bradford v. Romney*, 30 Beav. 431, 438; *Gray v. Boswell*, 13 Ir. Eq. R., N. S. 77; *Fallon v. Robins*, 16 id. 422. See *Bloomer v. Spittle*, 13 Law Rep., Eq. 427, per Ld. Romilly, M. R.; 41 L. J., Ch. 369, S. C.

¹ *Mortimer v. Shortall*, 2 Dru. & War. 372, per Sugden, C.; *Murray v. Parker*, 19 Beav. 305; *Rooke v. Ld. Kensington*, 2 Kay & J. 753; *Bentley v. Mackay*, 31 Beav. 143, 151, per Romilly, M. R.; 4 De Gex, F. & J. 279, S. C.; *Sells v. Sells*, 29 L. J., Ch. 500; 1 Drew. & Sm. 42, S. C.; *Fowler v. Fowler*, 4 De Gex & J. 250; *Elwes v. Elwes*, 2 Giff. 545; *Bradford v. Romney*, 30 Beav. 431, 438; *Gray v. Boswell*, 13 Ir. Eq. R., N. S. 77; *Fallon v. Robins*, 16 id., 422. See *Harris v. Pepperell*, 5 Law Rep., Eq. 1.

² 1 Story, Eq. Jur. § 144, n.

³ *Mortimer v. Shortall*, 2 Dru. & War. 374, per Sugden, C.; *Alexander v. Crosbie*, Lloyd & G. 150; *M. of Townsend v. Strangroom*, 6 Ves. 339; *Gillespie v. Moon*, 2 Johns. Ch. R. 600, per Kent, C.; *Lovesy v. Smith*, L. R., 15 Ch. D. 655, per Denman, J.; 49 L. J., Ch. 809, S. C.

⁴ 1 Story, Eq. Jur. § 161; 2 id. § 770; *M. of Townsend v. Strangroom*, 6 Ves. 328; *Davies v. Fitton*, 2 Dru. & War. 232, per Sugden, C.; *Wood v. Searth*, 2 Kay & J. 33; *Webster v. Cecil*, 30 Beav. 62; *Manser v. Back*, 6 Hare, 443, per Wigram, V.-C.; *Howard v. Wright*, 2 Coop. 114, per Leach, V.-C.; *Squire v. Campbell*, id. 114, per Ld. Cottenham. See *Carpenter v. Providence Washington Ins. Co.*, 4 Howard, S. Ct. R. 222.

against a plaintiff seeking a specific performance, it will be inadmissible in his *favour*; or, in other words, the courts will not receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution.¹ In America, however, Mr. Chancellor Kent, after a most elaborate consideration of the subject, has not hesitated to reject this distinction as unfounded in justice;² and Mr. Justice Story has taken the same view of the matter, observing, with much force, that there is no mutuality or equality in the operation of such a doctrine.³

§ 1141.⁴ The rule under discussion does not exclude verbal § 1043 evidence, when adduced to prove that the written agreement has been *totally waived or discharged*. If, indeed, the agreement be by *deed*, it can only be entirely, or even partially, dissolved by an instrument of an equally solemn character; for the maxim of law is well established, that *unumquodque ligamen dissolvitur eodem ligamine quo et ligatur*.⁵ Therefore, where to an action of covenant for non-payment of money, the defendant pleaded a parol discharge in satisfaction of all demands, the court held, upon demurrer, that the covenant could not be discharged without a deed.⁶ A similar decision was pronounced on a rule obtained by the plaintiff for judgment *non obstante veredicto*, in a case where an action had

¹ *Davies v. Fitton*, 2 Dru. & War. 232, per Sugden, C.; *M. of Townsend v. Strangroom*, 6 Ves. 328; *Woolam v. Hearne*, 7 Ves. 211; *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & B. 375; *Rich v. Jackson*, 4 Br. C. C. 514; 6 Ves. 334, n. S. C.; *Clinan v. Cooke*, 1 Sch. & Lef. 38, 39; *Att.-Gen. v. Sitwell*, 1 Y. & C., Ex. R. 559, 583; *Squire v. Campbell*, 2 Coop. 114, per Ld. Cottenham. See, however, *M'Cormack v. M'Cormack*, 1 L. R., Ir. 119. See also, *Gun v. McCarthy*, 13 L. R. Ir. 304, per Flanagan, J.

² *Keisselbrack v. Livingstone*, 4 Johns. Ch. R. 144, 148, 149.

³ 1 Story, Eq. Jur. § 161, and n. Those who require further information on this subject are referred to 1 Sug. V. & P. 222—233, and 258—266; 1 Story, Eq. Jur. §§ 152—161; Gresl. Ev. 205—209.

⁴ Gr. Ev. § 302, in part, as to first five lines.

⁵ 2 Inst. 360; Wing. Max. 68—72; Story, Agen. § 49; *Fowell v. Forrest*, 2 Wms. Saund. 47ff, 47gg; *Harris v. Goodwyn*, 2 M. & Gr. 405; 2 Scott, N. R. 459, S. C.; *Doe v. Gladwin*, 6 Q. B. 953, 962; *Rawlinson v. Clarke*, 14 M. & W. 187, 192.

⁶ *Rogers v. Payne*, 2 Wils. 376, recognised in *West v. Blakeway*, 2 M. & Gr. 751; *Cordwent v. Hunt*, 8 Taunt. 596. See *Spence v. Healey*, 8 Ex. R. 668; *May. of Berwick v. Oswald*, 1 E. & B. 295; *The Thames Iron Works Co. v. The Roy. Mail St. Packet Co.*, 13 Com. B., N. S. 358.

been brought by a landlord against his tenant, on a covenant by the latter to yield up, at the expiration of the term, all erections set up during the tenancy; the defendant having obtained a verdict on a plea stating an agreement between the parties, that, if the defendant built a greenhouse on the premises, he should be at liberty to remove it.¹ So, it used to be regarded, at common law, as an indifferent matter, whether the agreement in discharge of the deed were in writing or merely verbal, or whether it were executory or executed; and, therefore, if an act was required by deed to be done within a certain time, evidence could not be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended.² In this latter event, however, the courts would perhaps on equitable grounds now grant relief;³ at least, if it could be shown that the license to extend the time was founded on some good consideration.⁴

§ 1142. As the doctrine just stated has nothing to do with the general rule under discussion, but rests entirely on the solemn nature of deeds, any obligation by writing, which is not under seal, may, in the *absence of statutory interference*, be either *totally or partially dissolved before breach, by a subsequent oral agreement*; or, to adopt the language of Lord Denman in *Goss v. Lord Nugent*,⁵ “After an agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or

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¹ *West v. Blakeway*, 2 M. & Gr. 729; 3 Scott, N. R. 199, S. C. But see *Cort v. Ambergate, &c.*, Ry. Co., 17 Q. B. 127, 145, 146.

² *Gwynne v. Davy*, 1 M. & Gr. 857, 871, per Tindal, C. J.; *Littler v. Holland*, 3 T. R. 590. See *Nash v. Armstong*, 30 L. J., C. P. 286; 10 Com. B. N. S. 259, S. C. See, also, *Williams v. Stern*, L. R., 5 Q. B. D. 469; 49 L. J., Q. B. 663, S. C., questioning *Albert v. The Grosvenor Invest. Co.*, 37 L. J., Q. B. 24; 3 Law Rep., Q. B. 123; and 8 B. & S. 664, S. C.

³ *Gwynne v. Davy*, 1 M. & Gr. 868, per Tindal, C. J.

⁴ *Williams v. Stern*, L. R., 5 Q. B. D. 409; 49 L. J., Q. B. 663, S. C.

⁵ 5 B. & Ad. 65. By the law of Scotland, no written obligation whatever can be extinguished or renounced, without either the creditor's oath or a writing signed by him. Tait, Ev. 325. Neither can a written agreement be afterwards waived or varied by mere words; though a subsequent parol agreement, accompanied or followed by part performance, will suffice for that purpose; *Bargaddie Coal Co. v. Wark*, 3 Macq., Sc. Cas., H. of L. 467.

vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement."

§ 1143. With respect to those cases where a writing is by statute made necessary to the validity of an agreement, the rule is different; for although the better opinion seems to be, that contracts concerning the sale of land or goods, which fall within the 4th or 17th section of the Statute of Frauds, may be *wholly waived or abandoned* by a *subsequent oral agreement*, so as to prevent either party from recovering on the original written contract, this doctrine rests on the peculiar language of the Act of Charles the Second, which, without distinctly stating that the contracts in question must be in writing, merely enacts that, unless they are so, no action shall be brought upon them.¹ No general rule, therefore, can with safety be laid down respecting the validity of the oral dissolution of a statutory instrument; but, in each case, the special language of the Act requiring the writing must be duly considered; and in several cases, as, for instance, in that of a will, it is clear law that a verbal abandonment will not suffice.²

§ 1144. But whatever may be the effect of an oral dissolution of the entire statutory contract, thus much is certain, that *no verbal agreement to abandon it in part, or to add to, or modify, its terms, can be received*; for to allow such contracts to be proved partly by writing, and partly by oral testimony, would be to let in all the mischiefs which it was the object of the Legislature to exclude; and here it matters not what term of the written contract is sought to be varied by parol, since no distinction can be drawn between the material and immaterial parts of the contract; but everything which originally formed part of the agreement, in

¹ *Goss v. Ld. Nugent*, 2 B. & Ad. 58, 65, 66, per Ld. Denman; 2 N. & M. 28, S. C.; *Price v. Dyer*, 17 Ves. 356, per Sir W. Grant. These dicta go far towards overruling a contrary opinion expressed by Ld. Hardwicke in *Buckhouse v. Crossby*, 2 Eq. Cas. Ab. 32, pl. 44, and in *Bell v. Howard*, 9 Mod. 305.

² Ante, § 1063.

regard to which the parties are stipulating, must be deemed to be material.¹

§ 1145. If, then, a written contract is made for the sale, either 2 1047
of goods above the value of 10*l.*, or of lands, and the writing states a time for the delivery of the goods, or for the completion of the purchase, no verbal agreement to substitute another day for the one originally agreed upon will be valid,² but the original contract may still be enforced in its entirety.³ So, where a vendor had contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, the court held, that, in an action for the purchase money, he was not at liberty to show a verbal waiver by the purchaser of his right to a good title as to one lot; since the effect of such a waiver was to substitute a partly oral contract for the one, which the Statute of Frauds required to be in writing.⁴ So, where a master had agreed by letter to pay his clerk a *yearly* salary, and the contract was necessarily in writing, being one which would not be performed within a year from its date, parol evidence was held to be inadmissible, when tendered to show either a contemporaneous, or a subsequent, verbal agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made.⁵ Again, if an entire written agreement con-

¹ *Marshall v. Lynn*, 6 M. & W. 126, 117, per Parke, B.; *Emmet v. Dewhirst*, 21 L. J., Ch. 497; *Moore v. Campbell*, 10 Ex. R. 323; *Sanderson v. Graves*, 10 Law Rep., Ex. 234, 44 L. J., Ex. 210, S. C.

² *Stowell v. Robinson*, 3 Bing. N. C. 928; *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 A. & E. 57; 2 P. & D. 447, S. C.; *Tyers v. Rose-dale and Ferryhill Iron Co.*, 42 L. J., Ex. 185; 8 Law Rep., Ex. 305, S. C.; S. C. reversed in Ex. Ch., 10 Law Rep., Ex. 195; 44 L. J., Ex. 130, S. C. These cases overrule *Cuff v. Penn*, 1 M. & Sel. 21; *Warren v. Stagg*, cited in *Littler v. Holland*, 3 T. R. 591; and *Thresh v. Rake*, 1 Esp. 53. See *Ogle v. Ld. Vane*, 2 Law Rep., Q. B. 275; 36 L. J., Q. B. 175; 7 B. & S. 855, S. C.; & 37 L. J., Q. B. 77, S. C., *affd.* in Ex. Ch.; 3 Law Rep., Q. B. 272; & 8 B. & S. 182.

³ *Noble v. Ward*, 35 L. J., Ex. 81; 1 Law Rep., Ex. 117; and 4 H. & C. 149, S. C.; 36 L. J., Ex. 91, S. C. in Ex. Ch.; 2 Law Rep., Ex. 135, S. C. See, also, *Leather Cloth Co. v. Hieronimus*, 10 Law Rep., Q. B. 140; 44 L. J., Q. B. 54, S. C.; *Hickman v. Haynes*, 10 Law Rep., C. P. 598; 44 L. J., C. P. 358, S. C.; *Plevins v. Downing*, L. R., 1 C. P. D. 220; 45 L. J., C. P. 695, S. C.

⁴ *Goss v. Ld. Nugent*, 5 B. & Ad. 58; 2 N. & M. 28, S. C.

⁵ *Giraud v. Richmond*, 2 Com. B. 835; *Evans v. Roe*, 7 Law Rep., C. P. 138.

sists of divers particulars, some of which are within, and others without, the operation of the Statute of Frauds, a verbal agreement to vary the latter part in even some trifling particular, as, for instance, to have one valuer instead of two, cannot be received in evidence, though that part of the contract might, of itself, have been good without any writing.¹

§ 1146. In applying this doctrine to *testamentary instruments*, § 1048 care must be taken to mark the distinction between the revocation of a will, and the ademption, or, rather, the payment by anticipation, of a legacy; for although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy, by which term the law means, that the subject-matter of the legacy has been aliened by the testator in his lifetime.² Thus, where a testator bequeathed 3000*l.* to his daughter for her separate use for life, with remainder to her children, and gave the residue of his property to his son, it was held by Vice-Chancellor Wigram, in a suit by the children of the daughter against the son, claiming to have the legacy invested and secured for their benefit, that the defendant might show by extrinsic parol evidence that, after the date of the will, the testator, at his daughter's request, had paid her husband 500*l.*, and had then declared that this sum was to be considered in part satisfaction of the legacy; and that he had expressed his determination not to alter his will, having been advised by his solicitor that it was unnecessary to do so.³ It will be seen that the evidence here admitted did not in any way revoke or alter the will, but simply proved a transaction, whereby the daughter had in part received her legacy by anticipation; and the declarations of the testator, being contemporaneous with the advance of the money, were rightly considered as part of that transaction.

¹ *Harvey v. Grabham*, 5 A. & E. 61, 74; 6 N. & M. 164, S. C.

² *Harrison v. Jackson*, L. R., 7 Ch. D. 339, 341, per Jessel, M. R.; 47 L. J., Ch. 142, S. C.

³ *Kirk v. Eddowes*, 3 Hare, 509; *Ferris v. Goodburn*, 27 L. J., Ch. 574. See *Nevin v. Drysdale*, 36 L. J., Ch. 662.

§ 1147. It is almost superfluous to observe, that the rule is not § 1049
 infringed by proof of any *collateral* parol agreement, which does
 not interfere with the terms of the written contract, though it may
 relate to the same subject-matter.¹ For instance, the fact that a
 written demise of an unfinished house has been duly signed, will
 not preclude the tenant from proving that at the time of the demise
 the landlord verbally agreed with him to put the premises into
 a habitable state.² So where parties to an indenture of charter-
 party afterwards agreed by parol to use the ship for a period
 which was to elapse before the charter-party attached, it was held
 that this latter contract might be enforced by action.³ It would
 even seem, that, if money be received by a party, under circum-
 stances raising an implied promise to pay it to another, or under an
 express promise so to do, and subsequently a deed be entered into
 between these parties in order to ascertain the amount to be paid,
 an action of simple contract can be sustained.⁴ But if a debt be
 secured by deed, the mere subsequent statement of an account
 respecting it will not justify the creditor in bringing an action
 on an account stated, but he must still declare on the specialty,
 as the striking of a balance under these circumstances creates no
 new liability.⁵

§ 1148.⁶ Next, the rule does not restrict the court to the perusal § 1050
 of a single instrument or paper; for, while the controversy is be-
 tween the original parties, or their representatives, all *contempo-
 raneous writings* relating to the same subject-matter, are admissible
 in evidence, provided only that they be of equal solemnity with the
 principal document, and that no oral testimony be required for the
 purpose of connecting them therewith.⁷

¹ See ante, § 1135.

² Mann v. Nunn, 43 L. J., C. P. 241; Angell v. Duke, 44 L. J., Q. B. 78.

³ White v. Parkin, 12 East, 578. See Seago v. Deane, 4 Bing. 459; Fletcher v. Gillespie, 3 Bing. 635; Foster v. Allanson, 2 T. R. 479.

⁴ Edwards v. Bates, 7 M. & Gr. 600, 601, per Cresswell, J.

⁵ Middleditch v. Ellis, 2 Ex. R. 623.

⁶ Gr. Ev. § 283, in part.

⁷ Leeds v. Lancashire, 2 Camp. 205; Hartley v. Wilkinson, 4 Camp. 127; Stone v. Metcalf, 1 Stark. R. 53; Bowerbank v. Monteiro, 4 Taunt. 846, per Gibbs, J.; Gale v. Williamson, 8 M. & W. 405; Brown v. Langley, 4 M. & Gr. 466, 470; Peek v. N. Staffords. Ry. Co., 27 L. J., Q. B., 465; E.

§ 1149.¹ It may further be remarked, that the rule is *applied* § 105
only in suits between the parties to the instrument, and their representatives; and they alone are to blame if the writing contains what was not intended, or omits what it should have contained. It cannot affect third persons; who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and, who, therefore, ought not to be precluded from proving the truth, however contradictory it may be to the written statements of others.² Thus, in a settlement case, where the value of an estate upon which the validity of the settlement rested was in question, evidence of a greater sum having been paid for it than was recited in the purchase deed was held admissible.³ So, in a similar case, parol evidence has been received to show that lands, described in a deed of conveyance as in one parish, were in fact situated in another.⁴ So, also, to show that, at the time of entering into a contract of service in a particular employment, a further agreement was made to pay a sum of money as a premium for teaching the pauper the trade, whereby an apprenticeship was intended; and that the whole was therefore void for want of a stamp, and so no settlement was gained.⁵ In another pauper case, where an unstamped assignment of a parish apprentice stated that the new master, in consideration of 3*l.* paid him by the old master, agreed to accept the apprentice, &c., parol evidence that the money was in fact paid, not by the old master, but by the parish officer, was admitted for the purpose of showing that the instrument did not require a stamp.⁶

§ 1150. Some of the cases cited in the last section seem to have § 105
 been determined, not only on the ground that the contending parties were strangers to the deed, but on the principle that,

B. & E. 958, S. C.; *Hunt v. Livermore*, 5 Pick. 395; *Davlin v. Hill*, 2 Fairf. 434; *Couch v. Meeker*, 2 Conn. 302; *Lee v. Dick*, 10 Pet. 482; *Bell v. Bruen*, 17 Pet. 161; ante, § 1026.

¹ Gr. Ev. § 279, as to first nine lines.

² *R. v. Cheadle*, 3 B. & Ad. 838.

³ *R. v. Scammonden*, 3 T. R. 474; *R. v. Olney*, 1 M. & Sel. 387; *R. v. Cheadle*, 3 B. & Ad. 833.

⁴ *R. v. Wickham*, 3 A. & E. 517.

⁵ *R. v. Landon*, 8 T. R. 379.

⁶ *R. v. Llangunnor*, 2 B. & Ad. 616.

though parol evidence is inadmissible to contradict a written agreement, it may be offered to ascertain an independent collateral fact explanatory of the instrument.¹ Indeed, it appears that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the *récitals* of *formal matter*, which may well be presumed not to have been stated with careful precision.² For instance, parol evidence has, on several occasions, been admitted, to contradict the recited date of a deed, order, or other instrument; as by proving that a charter-party, dated February the 6th, conditioned to sail on or before February the 12th, was not executed till after the latter day, and that therefore the condition was dispensed with;³ or by showing, in answer to an objection that a notice of appeal was given too late, that the order, though bearing date the 24th of June, was in fact not signed by the justices till three days afterwards.⁴ In the case of *Reffell v. Reffell*,⁵ the Court of Probate admitted parol evidence to prove that a will bearing date the 27th of February, 1855, was in fact executed in 1865, and had consequently revoked another will that was made in 1858.

§ 1151. Having now, by a series of negative propositions, § 1053 pointed out the several classes of cases to which the rule under consideration does not extend, it will be expedient to advert shortly to some of the leading cases, in which the rule has been actually applied, and parol evidence has been rejected.⁶ The reason and policy of the rule will thus best be seen, as well as its nature and extent. For example,⁷ where a policy of insurance was effected on goods “in ship or ships from Surinam to London,” parol evidence was held inadmissible to show, that a particular ship, which was lost, had been verbally excepted at the time of the contract.⁸ So, where a policy described the two termini of the

¹ *R. v. Stoke-upon-Trent*, 5 Q. B. 308, per Williams, J. See *Summers v. Moorhouse*, L. R., 13 Q. B. D. 388.

² 3 St. Ev. 787, 788; 2 Poth., Obl. 181, 182.

³ *Hall v. Cazenove*, 4 East, 477. See *Steele v. Mart*, 4 B. & C. 273; *Cooper v. Robinson*, 10 M. & W. 694.

⁴ *R. v. Flintshire*, 3 Dowl. & L. 537, per Williams, J.

⁵ 1 Law Rep., P. & D. 139; 35 L. J., Pr. & Mat. 121, S. C.

⁶ See *Fawkes v. Lamb*, 31 L. J., Q. B. 98.

⁷ Gr. Ev. § 281, in part.

⁸ *Weston v. Emes*, 1 Taunt. 115.

voyage, the insurers were not allowed to prove by parol evidence, that the risk was not to commence till the vessel reached an intermediate place.¹ So, where the instrument purported to be an absolute engagement to pay on a specified day, parol evidence of a contemporaneous oral agreement, that the payment should be hastened or postponed,² or depend upon a contingency,³ or be made out of a particular fund, has been rejected;⁴ and where goods were sold under a written contract, which was silent as to the time when they were to be taken away and payment was to be made, parol evidence was held inadmissible to prove, either that the goods were to be removed by the purchaser immediately,⁵ or that they were sold on a credit of six months,⁶

§ 1152. Again, where a written agreement of partnership was unlimited as to the time of commencement, parol evidence, that it was at the same time verbally agreed that the partnership should not commence till a future day, was held inadmissible.⁷ So, in an action for use and occupation, upon a written memorandum of lease at a certain rent, parol evidence has been rejected of a contemporaneous verbal agreement to pay a further sum, being the ground-

¹ *Kaines v. Knightly*, Skin. 54; *Leslie v. De la Torre*, cited 12 East, 583.

² *Hoare v. Graham*, 3 Camp. 57; *Spartali v. Benecke*, 10 Com. B., 212, as explained by Williams, J., in *Field v. Lelean*, 30 L. J., Ex. 170; 6 H. & N. 627, 628, S. C.; *Besant v. Cross*, 10 Com. B., 895; *Hanson v. Stetson*, 5 Pick. 506; *Spring v. Lovett*, 11 Pick. 417.

³ *Abrey v. Crux*, 39 L. J., C. P. 9; 5 Law Rep., C. P. 37, S. C.; *M'Dougall v. Field*, 1 R., 6 C. L. 185; *Rawson v. Walker*, 1 Stark. R. 361; *Adams v. Wordley*, 1 M. & W. 374; *Foster v. Jolly*, 1 C. M. & R. 703; 5 Tyr. 239, S. C.; *Free v. Hawkins*, 8 Taunt. 92; *Woodbridge v. Spooner*, 3 B. & A. 233; *Scott v. Fairlamb*, 52 L. J., Q. B. 420; *Moseley v. Hanford*, 10 B. & C. 729; 5 M. & R. 607, S. C.; *Erwin v. Saunders*, 1 Cowen, 249; *Hunt v. Adams*, 7 Mass. 518. See *Salmon v. Webb*, 3 H. of L. Cas. 510; *Webb v. Salmon*, 13 Q. B. 886, 894, S. C.

⁴ *Campbell v. Hodgson*, Gow, N. P. R. 74.

⁵ *Greaves v. Ashlin*, 3 Camp. 426, per Ld. Ellenborough. See, also, *Harnor v. Groves*, 15 Com. B. 667.

⁶ *Ford v. Yates*, 2 M. & Gr. 549; 2 Scott, N. R. 645, S. C. In that case the court erroneously assumed, that the memorandum, which really contained the name of only one of the parties, was sufficient to satisfy the Stat. of Frauds; and on such assumption the decision was correct. See *Lockett v. Nicklin*, 2 Ex. R. 98—100, cited ante, § 1134.

⁷ *Dix v. Otis*, 5 Pick. 38.

rent of the premises, to the ground-landlord.¹ So, where a ship was particularly described in a written contract of sale, parol evidence of a further descriptive representation, made prior to the sale, was held inadmissible to charge the vendor, without proof of actual fraud; all previous conversation being merged in the written contract.² So, where a deed conveyed the messuage and land called Gotton farm, consisting of particulars specified in a schedule, and delineated in a map drawn thereon, evidence that a close, not included in the map and schedule, had always been occupied and treated as part of Gotton farm, was rejected.³

§ 1153. Where land let for years had,—prior to the passing of “the Apportionment Act, 1870,”⁴—been sold by the lessor, a contemporaneous parol agreement, that the current quarter’s rent should be apportioned between the vendor and purchaser, was held to be inadmissible.⁵ So, when a promissory note was in its terms joint, most lawyers, till recently, supposed that evidence could not be given that one of the makers was merely a surety, and that the payee had given time to the principal.⁶ This doctrine, however, has now been rejected, or, at least, held inapplicable to a case, where a money-lender has made advances on the security of a joint and several note, being well aware at the time that one of its makers was a surety.⁷ In such a case the surety, notwith-

¹ *Preston v. Merceau*, 2 W. Bl. 1249. See *The Isabella*, 2 Rob. Adm. 241; *White v. Wilson*, 2 B. & P. 116; *Rich v. Jackson*, 4 Br. C. C. 514; *Brigham v. Rogers*, 17 Mass. 571.

² *Pickering v. Dowson*, 4 Taunt. 779. See, also, *Stucley v. Baily*, 31 L. J., Ex. 483; 1 H. & C. 405, S. C.; *Powell v. Edmunds*, 12 East, 6; *Pender v. Fobes*, 1 Dev. & B. 250; *Wright v. Crookes*, 1 Scott, N. R. 685.

³ *Barton v. Dawes*, 10 Com. B. 261; *Llewellyn v. Ld. Jersey*, 11 M. & W. 183. See post, §§ 1224, 1225. ⁴ 33 & 34 V., c. 35.

⁵ *Flinn v. Calow*, 1 M. & Gr. 589.

⁶ *Abbott v. Hendricks*, 1 M. & Gr. 794, per Tindal, C. J.; *Manley v. Boycot*, 2 E. & B. 46; *Strong v. Foster*, 25 L. J., C. P. 106; 17 Com. B. 201, S. C. See *Davies v. Stainbank*, 6 De Gex, M. & G. 679; *Riley v. Gerrish*, 9 Cush. 104; and *Myrick v. Daine*, id. 248.

⁷ *Greenough v. McClelland*, 30 L. J., Q. B. 15; 2 E. & E. 424, S. C.; *Mutual Loan Fund Assoc. v. Sudlow*, 28 L. J., C. P. 108; 5 Com. B., N. S. 449, S. C.; *Pooley v. Harradine*, 7 E. & B. 431; *Taylor v. Burgess*, 5 H. & N. 1; *Lawrence v. Walmsley*, 31 L. J., C. P. 143; 12 Com. B., N. S. 799, S. C.;

standing the form of the note, may plead as an *equitable* defence, and prove, that he was known by the lender to be a surety when the note was made, and that, without his consent, the principal has had time given to him by the lender.¹ It may be thought that these decisions savour more of substantial justice than of rigid principle; but, be this as it may, it seems clear that if a party signs a bill of exchange, a charter-party,² or indeed, any written contract, in his own name, and there is nothing in the instrument to show that he intends merely to act on behalf of a named principal,³ he cannot avoid his personal liability by giving parol evidence that he merely signed as the agent of another, and that the party with whom he contracted was aware of that fact;⁴ although, if the object be on the one hand to charge with liability,⁵ or on the other to give the benefit of the contract to,⁶ the unnamed principal, such evidence will be received; and this, too, whether the Statute of Frauds does or does not require the agreement to be in writing. The distinction between these two cases is, that in the former the parol evidence would clearly contradict the written agreement, but in the latter it would have no such effect; for without denying that the agreement was binding on the party whom it purported to bind, the evidence would merely go to show that another party, namely the principal,

Bristow *v.* Brown, 13 Ir. Law R., N. S. 201; Bailey *v.* Edwards, 34 L. J., Q. B. 41; 4 B. & S. 761, S. C.; Overend, Gurney & Co. (Liquid.) *v.* Oriental Financial Corp. (Liquid.) 7 Law Rep., H. L. 348.

¹ Id.

² Hough *v.* Manzanos, 48 L. J., Ex. 398; L. R., 4 Ex. D. 104, S. C.

³ Gadd *v.* Houghton, 46 L. J., Ex. 71, per Ct. of App.

⁴ Higgins *v.* Senior, 8 M. & W. 834; Roy. Ex. Ass. Co. *v.* Moore, 2 New R. 63, per Q. B.; Sowerby *v.* Butcher, 2 C. & M. 371; 4 Tyr. 320, S. C.; Magee *v.* Atkinson, 2 M. & W. 440; Jones *v.* Littledale, 6 A. & E. 486; 1 N. & P. 677, S. C.; Stackpole *v.* Arnold, 11 Mass. 27; Hunt *v.* Adams, 7 Mass. 518; Shankland *v.* City of Washington, 5 Pet. 394; Lefevre *v.* Lloyd, 5 Taunt. 749; 1 Marsh. 318, S. C. But see Holding *v.* Elliott, 29 L. J., Ex. 134; 5 H. & N. 117, S. C., cited ante, § 804. See, also, Williamson *v.* Barton, 31 L. J., Ex. 170.

⁵ Paterson *v.* Gandasequi, 15 East, 62; 2 Smith, L. C. 295, S. C.; cited and confirmed in Higgins *v.* Senior, 8 M. & W. 844, per Parke, B.; Calder *v.* Dobell, 40 L. J., C. P. 89; aff. in Ex. Ch., id. 224; 6 Law Rep., C. P. 486, S. C.

⁶ Garrett *v.* Handley, 4 B. & C. 664; Bateman *v.* Phillips, 15 East, 272; both cited and confirmed in 8 M. & W. 844, per Parke, B.

was also bound, on the well-known doctrine that the act of an authorised agent is, in law, the act of the principal.¹

§ 1154. Again, though a person were to describe himself in a written contract as the agent of an unnamed principal, he might be shown to be the real principal in the event of his being sued by the party with whom he contracted.² Nay, in an action brought by himself against the other contracting party, he might repudiate the character of agent and adopt that of principal; and on furnishing proof that he entered into the agreement on his own behalf, he would be entitled to recover in his own name.³ Where, however, an agent, who was employed to enter into a charter-party, described himself in the instrument as the owner of the ship, it was held, in an action by the principal on the charter-party, that the agent could not give parol evidence of his having acted merely as agent for the plaintiff, since such evidence would directly contradict the language contained in the written document.⁴ § 1051

§ 1155.⁵ Even the subsequent admission of the party as to the true intent and construction of the title-deed under which he claims, cannot be received in contradiction of the language therein contained.⁶ Thus, where a deed purported to convey a messuage in the occupation of A., *with the appurtenances*, and it appeared that A. had occupied a small adjoining garden with the house, the written conditions of sale excepting the garden, and the declarations of the grantee that he had not purchased it, were held inadmissible to contradict the plain language of the deed, under which the garden had clearly passed as appurtenant to the messuage.⁷ § 1055

§ 1156. Still less will any statements made by the writer of the instrument be receivable in evidence with the view of varying its § 1056

¹ *Higgins v. Senior*, 8 M. & W. 844, 845, per Parke, B.

² *Carr v. Jackson*, 7 Ex. R. 382.

³ *Schmeltz v. Avery*, 16 Q. B. 655.

⁴ *Humble v. Hunter*, 12 Q. B. 310.

⁵ Gr. Ev. § 281, as to the first three lines.

⁶ *Pain v. M'Intier*, 1 Mass. 69, as explained in 10 Mass. 461. See, also, *Townsend v. Weld*, 8 Mass. 146.

⁷ *Doe v. Webster*, 12 A. & E. 442; 4 P. & D. 270, S. C.

terms. Thus, where a testator devised to his eldest son his residence with the *buildings to the same adjoining*, and left to his second son all his other real property, declarations made by him, while giving instructions for his will, were rejected,—they being tendered to show that he intended some cottages, which it was proved adjoined his residence at the time when the will was made, to pass to his second son.¹ Again, it is well established that where, in a will, a complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator;² and the principle, of course, is precisely the same, whether it be the person of the devisee, or the estate or thing devised, which is left in blank.³

§ 1157. The case of *Miller v. Travers*⁴ furnishes an apt illustration of the rule under discussion. There the testator devised all his freehold and real estate “in the county of Limerick, and in the city of Limerick.” He had no real estates in the county of Limerick, but his landed property consisted of estates in the county of Clare, which were not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the testamentary charges. Under these circumstances the court held, that the devisee could not be allowed to show by parol evidence, that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that by mistake⁵ he erased the words “county of Clare;” and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. “The plaintiff,” said Chief Justice Tindal, in pronouncing the joint opinion of himself, Lord Lyndhurst, and Lord Chancellor

§ 1057

¹ *Doe v. Holtom*, 4 A. & E. 76.

² *Hunt v. Hort*, 3 Br. C. C. 311; *Miller v. Travers*, 8 Bing. 253, 254, per Tindal, C. J.

³ *Miller v. Travers*, 8 Bing. 254, per Tindal, C. J.; *Taylor v. Richardson*, 2 Drew. 16.

⁴ 8 Bing. 244. See, also, *In re The Clergy Society*, 2 Kay & J. 615.

⁵ See, also, *Francis v. Dichfield*, 2 Coop. 531, per Ld. Hardwicke.

Brougham,¹ "contends that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted."²

§ 1158. The language of Chief Justice Tindal just cited leads § 1058 naturally to the consideration of another rule, which is this; namely, that, although extrinsic parol evidence, contradicting, varying, adding to, or subtracting from, the contents of a valid written instrument, is inadmissible; first, because the parties to the instrument must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning; and secondly, because of the mischiefs which would result, if verbal testimony were in such cases received; still, *parol evidence may in all cases of doubt be adduced, to explain the written instrument*; or, in other words, to enable the court to discover the meaning of the terms employed, and to apply them to the facts.³ Now, the *doubt* here adverted to may arise from one or both of the two following causes; either the *language* of the instrument may be *unintelligible* to the court, or, at least, be *susceptible of two or more meanings*; or the *persons or things* mentioned may require

¹ Lord Lyndhurst, C. B., and Tindal, C. J., had been summoned to assist the Ld. Chan. in this case.

² 8 Bing. 249, 250.

³ *Shore v. Wilson*, 9 Cl. & Fin. 555, per Parke, B.

to be identified.¹ The rule, therefore, embraces two descriptions of evidence.

§ 1159.² And first, if the characters, in which the instrument § 1059 is written; are in short-hand,³—or are otherwise difficult to be deciphered,—or if the language, whether as being foreign, obsolete, technical, local, or provincial, is either not understood by the court, or is capable of bearing two or more interpretations,—the testimony of persons skilled in deciphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms employed, is admissible, to interpret the characters, or to translate the instrument, or to testify to the proper meaning of particular expressions.⁴ The first branch of this rule has been acted upon in several cases, where wills, written in a scarcely legible hand, have been interpreted by Courts of Equity, with the assistance of persons skilled in writing.⁵ The practice of proving translations of foreign documents is so notorious as to require no authority to support it; while the remainder of the rule is established beyond dispute by an absolute cloud of decisions.

§ 1160. Before adverting more particularly to these decisions, it § 1060 may be well to observe, that in cases of this nature the testimony resorted to consists for the most part of evidence of *usage*; that is, witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that, according to the recognised practice and usage of such business, trade, or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning. The jury are then asked to presume that the parties, who employed these expressions, intended to use them, and did use them, in the conventional sense as

¹ 9 Cl. & Fin. 555, 556, per Parke, B.; 566, 567, per Tindal, C. J.

² Gr. Ev. § 280, in part.

³ See *Kell v. Charmer*, 23 Beav. 195, cited post, § 1196.

⁴ 9 Cl. & Fin. 555, 556, per Parke, B.; 566, 567, per Tindal, C. J.; *Wigr. Wills*, 61.

⁵ *Goblet v. Beechey*, 3 Sim. 24; *Wigr. Wills*, 187, 196, S. C.; *Masters v. Masters*, 1 P. Wms. 425; *Norman v. Morrell*, 4 Ves. 769.

explained by the witnesses.¹ The term “usage,” as here interpreted, should be distinctly understood, because it will presently be seen,² that the same word is frequently used by lawyers to denote a species of evidence, which is often admitted for the purpose of explaining ancient ambiguous grants, and which consists in the proof of the contemporaneous acts of the grantors or grantees, in relation to the property conveyed.

§ 1161. In resorting to evidence of *usage* for the meaning of particular words in a written instrument, no distinction exists between such words as are purely local or technical;—that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science or trade, or by a particular class of persons;—and words which have two meanings, the one common and universal, the other technical, peculiar, or local. In either case, extrinsic evidence of usage will alike be admissible to define and explain the technical, peculiar, or local meaning of the language employed; though in the latter case, it will also be necessary to prove such additional circumstances, as will raise a presumption that the parties intended to use the words in what logicians call their second intention, unless this fact can be inferred from reading the instrument itself. Thus, where the founder of a charity in the early part of the eighteenth century had, in the deed of grant, described the objects of her munificence as “Godly preachers of Christ’s Holy Gospel,” and it became necessary to determine a few years ago what persons were entitled to the charity,—extrinsic evidence was admitted to show, that at that period of history a religious sect existed, who applied this particular phraseology, capable though it seemed at first sight of a far wider interpretation, to Protestant Trinitarian Dissenters, and that the founder was herself a member of such sect.³ § 1061

¹ See ante, § 181.

² Post, §§ 1204, 1205.

³ *Shore v. Wilson*, 9 Cl. & Fin. 355, 580, per Ld. Cottenham. See, also, *Att.-Gen. v. Drummond*, 1 Dru. & War. 353; *Drummond v. Att.-Gen.*, 2 H. of L. Cas. 837, 857, S. C., on appeal; and 7 & 8 V., c. 45, noticed ante, § 75.

§ 1162.¹ So the words, "inhabitant,"²—"level,"³ as understood by miners,—“thousand,”⁴ as locally applied to rabbits on a warren,—“weeks,” as used in a theatrical contract,⁵—"months," as meaning calendar months in a charter-party,⁶—"days," as meaning working days in a bill of lading,⁷—"fur,"⁸—"corn,"⁹—"pig-iron,"¹⁰—"salt,"¹¹—"freight,"¹²—and many other expressions,¹³ which *prima facie* presented no ambiguity, have been interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connexion with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were *usually* received, when employed in cases similar to that under investigation.¹⁴ So, the meaning of the phrase, "duly honoured," when applied to a bill of exchange,¹⁵—of the words "arrived in dock,"¹⁶ and "in turn to deliver,"¹⁷ respectively contained in a charter-party,—and of the expression, "in the month of October," as fixing the part of the month, within which a vessel was to sail,¹⁸

¹ Gr. Ev. § 280, in part.

² *R. v. Mashiter*, 6 A. & E. 153; *R. v. Davie*, id. 386.

³ *Clayton v. Gregson*, 5 A. & E. 302.

⁴ *Smith v. Wilson*, 3 B. & Ad. 728; recognised by Williams, J., in *Shore v. Wilson*, 9 Cl. & Fin. 543.

⁵ *Grant v. Maddox*, 15 M. & W. 737. See *Myers v. Sarl*, 30 L. J., Q. B. 9; 3 E. & E. 306, S. C.

⁶ *Jolly v. Young*, 1 Esp. 186; recognised in *Simpson v. Margitson*, 11 Q. B. 32.

⁷ *Cochran v. Retberg*, 3 Esq. 121.

⁸ *Astor v. Union Ins. Co.*, 7 Cowen, 202.

⁹ *Mason v. Skurray*, and *Moody v. Surridge*, Park, Ins. 245; *Scott v. Bourdillion*, 2 N. R. 213.

¹⁰ *Mackenzie v. Dunlop*, 3 Macq. Sc. Cas., H. of L. 26, per Ld. Cranworth, C.

¹¹ *Journu v. Bourdieu*, Park, Ins. 245.

¹² *Peisch v. Dickson*, 1 Mason, 11, 12; *Gibbon v. Young*, 2 Moore, 224; *Lewis v. Marshall*, 7 M. & Gr. 729, 743, 744; 8 Scott, N. R. 477, S. C.

¹³ See *Symonds v. Lloyd*, 6 Com. B., N. S. 691, where the rule appears to have been strained to its utmost limit.

¹⁴ See *Lewis v. Marshall*, 7 M. & Gr. 729, 738, and cases there collected.

¹⁵ *Lucas v. Groning*, 7 Taunt. 164.

¹⁶ *The Steamship Co. Norden v. Dempsey*, 45 L. J., C. P. 764.

¹⁷ *Robertson v. Jackson*, 2 Com. B. 412; *Leidemann v. Schultz*, 14 Com. B. 38.

¹⁸ *Chaurand v. Angerstein*, Pea. R. 43. See, also, *Robertson v. Jackson*, 2 Com. B. 412; *U. S. v. Breed*, 1 Sumn. 159.

—has been ascertained by parol evidence of mercantile usage. So, where a ship was warranted “to depart with convoy,” extrinsic evidence was admitted to show at what place convoy for such a voyage as the one then contemplated was usually taken; and to that place the parties were presumed to refer.¹ So, also, the responsibility of an underwriter for “general average” under an ordinary policy of insurance on a ship and cargo, may be limited by a custom of trade, so as not to extend to the jettison of goods which have been stowed on deck.² So parol evidence has been admitted to show that the term “weekly accounts” in a building contract has, by the usage of trade, a technical signification, and means accounts of day-work only, exclusive of work which is capable of being measured.³

§ 1163. Again, where one of the subjects of a charter-party was “cotton in bales,” oral evidence of the mercantile meaning of this term was received;⁴ and it has been proved by similar testimony, that the words, “expected to arrive about November next,” when used in a bought-note, created no contract as to time, but were a mere representation.⁵ So, parol evidence has been admitted to show, that, by usage in the hop trade, a sale of “ten pockets of Kent hops at 5*l.*,” means 5*l.* per cwt.⁶ So, where goods having been sent to a London packer to prepare for exportation, he acknowledged their receipt “on account of the vendor for the vendee,” evidence of usage was admitted to prove, that, when packers signed receipts in this form, it was their duty not to part with the goods without the vendor’s further orders.⁷ So, also, where an Irish corn-merchant had sent written instructions to his *del credere* agent in

§ 1062

¹ Lethulier’s case, 2 Salk. 443; recognised by Williams, J., in *Shore v. Wilson*, 9 Cl. & Fin. 543.

² *Miller v. Tetherington*, 6 H. & N. 278; 30 L. J., Ex. 217, S. C.; 7 H. & N. 954, S. C. in Ex. Ch. See *Kidston v. The Empire Marine Ins. Co.*, 35 L. J., C. P. 250; 1 Law Rep., C. P. 535; 1 H. & R. 433, S. C.; 2 Law Rep., C. P. 357, S. C., in Ex. Ch.

³ *Myers v. Sarl*, 30 L. J., Q. B. 9; 3 E. & E. 306, S. C.

⁴ *Taylor v. Briggs*, 2 C. & P. 525; *Gorissen v. Perrin*, 27 L. J., C. P. 29; 2 Com. B., N. S. 681, S. C.

⁵ *Bold v. Rayner*, 1 M. & W. 343; Tyr. & Gr. 820, S. C.

⁶ *Spicer v. Cooper*, 1 Q. B. 424; 1 G. & D. 52, S. C.

⁷ *Bowman v. Horsey*, 2 M. & Rob. 85, per Ld. Abinger.

London, to sell some oats "*on his account*," parol evidence was held admissible on the agent's part, for the purpose of showing that, by the custom of the London corn trade, he was warranted under these instructions in selling in his own name.¹

§ 1164. The reports contain many cases, where the language of *policies* has been explained by evidence of the understood practice of making voyages in particular branches of trade.² For instance, though, according to the general import of the words "at and from," a policy would attach upon the ship's first mooring in a harbour on the coast; yet, where these expressions were employed in a Newfoundland policy, they were explained by evidence of usage to mean, that the risk should not commence till the expiration of the fishing, technically called "banking," or of an intermediate voyage.³ In all cases of this kind, it is unnecessary for the assured or his broker to communicate the usage to the underwriter, because, as Lord Mansfield has observed, "every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself."⁴ 1063

§ 1165. But, though evidence of *usage* may be admissible to explain what is doubtful, it is *not admissible to contradict or vary* what is plain;⁵ and therefore, if the words employed in a written instrument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular, sense, will be rejected; unless the words, if interpreted according to their strict legal acceptance, be wholly insensible with reference, § 1064

¹ Johnston v. Usborne, 11 A. & E. 549.

² See Trueman v. Loder, 11 A. & E. 600; and Milward v. Hibbert, 3 Q. B. 135, 137.

³ Vallance v. Dewar, 1 Camp. 503, 508, per Ld. Ellenborough; Ougier v. Jennings, id. 505, 506, n., per Ld. Eldon; Kingston v. Knibbs, id. 108, per Ld. Ellenborough.

⁴ Noble v. Kennoway, 2 Doug. 513; cases cited in last note; Da Costa v. Edmunds, 4 Camp. 143, per Ld. Ellenborough.

⁵ Blackett v. Roy. Ex. Ass. Co., 2 C. & J. 249, 250, per Ld. Lyndhurst; Crofts v. Marshall, 7 C. & P. 597, 607, per Ld. Denman. See, also, Phillips v. Briard, 25 L. J., Ex. 233; 1 H. & N. 21, S. C.; Abbott v. Bates, 45 L. J., C. P. 117.

either to the context, or to the extrinsic facts.¹ Thus, if a word denoting weight, measure, or number, has had a definite meaning attached to it by the Legislature, any party using that word in a written contract, or a will, will be conclusively presumed to have used it in such sense, unless the contrary clearly appears from some part of the writing itself.² It seems, too, that, since the Act of Parliament passed for altering the style, the words, *Lady Day* and *Michaelmas*, if used in a lease, have respectively been presumed to mean the 25th of March and the 29th of September; and no parol evidence of the custom of the country is admissible to show that the parties used these words with reference to the old style.³ In several cases, however, of parol demises, such evidence has been received;⁴ but whether the distinction hitherto drawn between a letting by deed, and a letting by parol, would now be sustained, may admit of a serious doubt.

§ 1166.⁵ On a warranty of prime singed bacon, evidence of a practice in the trade to receive bacon slightly tainted as prime singed, has been rejected.⁶ So, where a policy was made in the usual form, upon the ship, her tackle, apparel, boats, &c., evidence of usage, that the underwriters never pay for the loss of boats slung upon the quarter, outside of the ship, was held inadmissible.⁷ So, parol evidence has been rejected, when tendered for the purpose of proving that the words "glass ware in casks," contained in the memorandum of excepted articles in a fire policy, meant, according to the understanding of insurers and insured, such ware in open

¹ Wigr., Wills, 11, 12, cited ante, § 1131, n. 4.

² *Smith v. Wilson*, 3 B. & Ad. 731—734, per Ld. Tenterden, and Parke, J.; *O'Donnell v. O'Donnell*, 1 L. R., Ir. 284, per V.-C.; aff. on app., 13 L. R., Ir. 226; *Hockin v. Cooke*, 4 T. R., 314; *Att.-Gen. v. Cart Plate Glass Co.*, 1 Anstr. 39; *Noble v. Durell*, 3 T. R. 271; *Sleght v. Rhinelanders*, 1 Johns. 192; *Frith v. Barker*, 2 Johns. 335; *Stoevers v. Whitman*, 6 Binn. 417; *Henry v. Risk*, 1 Dall. 465.

³ *Doe v. Lea*, 11 East, 312.

⁴ *Doe v. Benson*, 4 B. & A. 588; *Furley v. Wood*, 1 Esp. 198, per Ld. Kenyon.

⁵ Gr. Ev. § 292, in part.

⁶ *Yates v. Pym*, 6 Taunt. 446. See, also, *Malcomson v. Morton*, 11 Ir. Law R. 230.

⁷ *Blackett v. Roy. Ex. Ass. Co.*, 2 C. & J. 244. See *Hall v. Janson*, 4 E. & B. 500. But see, also, *Miller v. Tetherington*, 6 H. & N. 278; 7 H. & N. 954, S. C. in Ex. Ch.; and *Myers v. Sarl*, 30 L. J., Q. B. 9; 3 E. & E. 306, S. C., both cited ante, § 1162.

casks only.¹ So, where a bill of lading contained the usual clause, "the dangers of the sea only excepted," the court held, that the shipowners could not rely on an established custom in the trade, that persons in their position should only be liable for damages occasioned by their own neglect, provided they saw the merchandise properly secured and stowed.² So, also, where some linseed was bought to be delivered at Hull, and "fourteen days to be allowed for its delivery from the time of the ship's being ready to discharge," evidence to show that this stipulation was intended by the parties for the benefit, not of the seller, but of the buyer, who had the option of accepting the seed during any portion of the fourteen days, has been rejected.³

§ 1167. Where goods had been sold through a London broker § 1066
under a written contract, which stipulated that payment should be made by bills, Lord Ellenborough rejected evidence of a custom, that *bills* meant *approved* bills, and that the vendor had the option of rejecting any bill of which he disapproved;⁴ and, although the same learned judge, in a subsequent stage of the case, admitted evidence of a usage of trade, which reserved to vendors, selling through brokers in the manner above stated, the power of annulling the contract within a reasonable time after the name of the purchaser had been communicated to them,—serious doubts may be entertained whether he was right in so doing; and whether the custom, thus allowed to be proved, was so incidental to the contract, as, in the absence of express words, to be incorporated in it.⁵

§ 1168. Parol evidence of usage or custom is not confined to § 1067
cases where the written instrument is expressed in ambiguous technical language; for⁶ it is certainly sometimes admissible "to

¹ *Bend v. Georgia Ins. Co.*, Sup. Ct., N. York, 1842; cited in Gr. Ev. § 292.

² *The Schooner Reeside*, 2 Sumn. 567.

³ *Sotilichos v. Kemp*, 3 Ex. R. 105.

⁴ *Hodgson v. Davies*, 2 Camp. 532, approved of by Ld. Denman in *Trueman v. Loder*, 11 A. & E. 599.

⁵ *Hodgson v. Davies*, 2 Camp. 531, questioned by Ld. Denman in *Trueman v. Loder*, 11 A. & E. 599.

⁶ Gr. Ev. § 294, as to four lines.

annex incidents," as it is termed,—that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. For instance, though a bill of exchange or promissory note is silent as to any days of grace,¹ parol evidence of the known and established usage of the country or place where the bill or note is payable, is admissible to show on what day the grace expired.² So, it may be proved by parol, that it is the custom in

¹ The time is surely come for abolishing this useless and inconvenient "incident." See next note, head "England."

² *Renner v. Bank of Columbia*, 9 Wheat. 581, where the decisions on this point are reviewed by Thompson, J. The following table, copied from Mr. Chitty's large work on Bills, 374—376, may be found of practical use; though too much reliance should not be placed on its entire accuracy:—

<i>Altona</i>	Sundays and holidays included, and bills falling due on a Sunday or holiday must be paid, or in default thereof protested, on the day previous	12 days.
<i>America</i>		3 days.
<i>Amsterdam</i>	Abolished since the Code Napoleon	none.
<i>Antwerp</i>	Abolished by the Code Napoleon	none.
<i>Berlin</i>	When bills do not fall due on a Sunday or holiday, in which case they must be paid or protested the day previous	3 days.
<i>Brazil</i>	Rio de Janeiro, Bahia, including Sundays, &c., as in the last case	15 days.
<i>England, Scotland, Wales, and Ireland</i>	But bills and notes, which are expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed, are not entitled to any days of grace, 45 & 46 V., c. 61, §§ 10, 14.	3 days*
<i>France</i>	Abolished by the Code Napoleon, Livre i., tit. 8, § 5, pl. 135; 1 Pardess. 189. Ten days were formerly allowed; Poth. pl. 14, 15	none:
<i>Frankfort-on-the-Maine.</i> . . . }	Except on bills drawn at sight, Sundays and holidays not included	4 days.
<i>Genoa</i>	Abolished by the Code Napoleon	none.
<i>Hamburg</i>	Same as Altona	12 days.
<i>Ireland</i>		3 days.
<i>Leghorn</i>		none.
<i>Lisbon and Oporto</i>	15 days on local, and 6 on foreign bills; but if not previously accepted, must be paid on the days they fall due	6 days, or 15 days.
<i>Naples</i>	Abolished by the Code Napoleon	none.
<i>Palermo</i>		none.

* 45 & 46 V., c. 61, § 14.

particular trades, under general contracts of hiring and service, for the contracts to be defeasible on giving a month's notice on either side,¹ or for the persons employed to have certain holidays in the year, and the Sundays to themselves.² So, it may be shown by parol, that a heriot is due by custom on the death of a tenant for

<i>Petersburgh</i>	Bills drawn after date are entitled to 10 days' grace, those drawn at sight to only 3 days, and those at any number of days after sight, none whatever. But bills received and presented after they are due, are nevertheless entitled to 10 days' grace. In these days of grace are included Sundays and holidays, as also the day when the bill falls due, on which days they cannot be protested for non-payment, but on the morning of the last day of grace payment must be demanded, and if not complied with, the bill must be protested before sunset	10 days, 3, &c.
<i>Rio de Janerio,</i> <i>Bahia, and other</i> <i>parts of Brazil</i>	Days of grace on foreign bills are 15, including holidays and Sundays, and if due on any such day, must be paid, or in default thereof protested, on the previous day.	15 days.
<i>Rotterdam</i>		
<i>Scotland</i>	Abolished by the Code Napoleon	none.
<i>Spain</i>	Vary in different parts of Spain, generally 14 days on foreign, and 8 on inland bills; at Cadiz only 6 days' grace. When bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace; nor any bills, unless accepted prior to maturity	14 days, but vary.
<i>Trieste</i>	3 days on bills drawn after date, or any term after sight not less than 7 days, or payable on a particular day; but bills presented after maturity must be paid within 24 hours. Sundays and holidays are included in the days of grace, and if the last day of grace fall on such a day, payment must be made, or the bill protested, on the first following open day	3 days.
<i>Venice</i>	6 days, in which Sundays, holidays, and the days when the bank is shut, are not included	6 days.
<i>Vienna</i>	Same as Trieste	3 days.
<i>Wales</i>		3 days.

¹ *Parker v. Ibbetson*, 4 Com. B., N. S. 348.

² *R. v. Stoke-upon-Trent*, 5 Q. B. 303.

life, though it be not expressed in the lease.¹ So, a lessee by deed may show, that, by the custom of the country, he is entitled to an away-going crop, though no such right be reserved in the deed.² So, a publican, holding premises under a written agreement, which reserved a weekly rent, but was otherwise silent as to the period of the tenancy, has been allowed in Ireland to prove a custom among licensed victuallers, according to which a tenant paying in advance the yearly victualler's license, is deemed to have a yearly tenure, though the rent be payable weekly.³

§ 1169. Again, in an action for the price of tobacco, evidence will be admissible to show, that, by the usage of the trade, all sales of tobacco are by sample, although this term be not expressed in the bought and sold notes.⁴ In another case, where a quantity of linseed oil had been sold through London brokers by bought and sold notes, and the name of the purchaser was not disclosed in the bought note, evidence was received of a usage of trade in the City, by which every buying broker, who did not, at the date of the bargain, name his principal, rendered himself liable to be treated by the vendor as the purchaser.⁵ So, where a person had contracted in the body of a charter-party "as agent," evidence was admitted to show a custom that he should be personally liable, if he did not disclose the name of his principal within a reasonable time.⁶

¹ *White v. Sayer*, Palm. 211.

² *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith, L. C. 520; and 1 Bligh, 287, S. C.; *Senior v. Armitage*, Holt, N. P. R. 197, explained by Parke, B., in 1 M. & W. 476; *Hutton v. Warren*, 1 M. & W. 466; Tyr. & Gr. 646, S. C. See *In re Estate of M. of Waterford*, I. R., 5 Eq. 434.

³ *Lundy v. Reilly*, 30 Law Times, 223, in Ir. Ex.

⁴ *Syers v. Jonas*, 2 Ex. R. 111; *O'Neill v. Bell*, I. R., 2 C. L. 68. See, also, *Brown v. Byrne*, 3 E. & B. 703; *Cuthbert v. Cumming*, 10 Ex. R. 809; aff. in Ex. Ch., 11 Ex. R. 405; *Lucas v. Bristow*, 27 L. J., Q. B. 364; E. B. & E. 907, S. C.

⁵ *Humfrey v. Dale*, 26 L. J., Q. B. 137; 7 E. & B. 266, S. C.; *Dale v. Humfrey*, 27 L. J., Q. B. 390; E. B. & E. 1004, S. C., in Ex. Ch.; *Imperial Bk. v. Lond. & St. Katherine's Dock Co.*, 46 L. J., Ch. 335, 337, per Jessel, M. R.; *Fleet v. Murton*, 41 L. J., Q. B. 49; 7 Law Rep., Q. B. 126, S. C. See *Southwell v. Bowditch*, L. R., 1 C. P. D. 100; 45 L. J., C. P. 630, S. C., per Ct. of App.

⁶ *Hutchinson v. Tatham*, 42 L. J., C. P. 260; 8 Law Rep., C. P. 482, S. C. (3865)

So, where some mining shares had been sold upon the terms that they should be paid for "half in two, and half in four months," but the contract was silent as to the time of their delivery, the court, in an action against the purchaser for not accepting and paying for the shares, admitted evidence of a usage among brokers, that on contracts for the sale of mining shares, the vendor was not bound to deliver them without contemporaneous payment.¹ So, where a horse had been sold by private contract at a repository, with a written warranty of soundness, and the purchaser afterwards brought an action against the seller, the horse turning out to be unsound, the defendant was permitted to show that, by one of the printed regulations hung up in the repository, warranties were only to remain in force till twelve o'clock on the day after the sale; and then, upon further proof, that the plaintiff was aware of this regulation, and yet made no complaint within the specified time, a nonsuit was directed to be entered.²

§ 1170. This rule of annexing incidents by parol, which, time out of mind, has been adopted in explanation of mercantile proceedings, and is now generally applied to contracts respecting any transaction wherein known usages have prevailed, rests on the presumption that the parties did not intend to express in writing the whole of the agreement by which they were to be bound, but only to make their contract with reference to the established usages and customs relating to the subject-matter.³ But here it must be borne in mind, that "incidents" are frequently "annexed" to contracts, and conditions implied, not only by the usage or custom of trade, which is always a matter of evidence, but by the law-merchant, which is judicially noticed without proof,⁴ and by the common law,⁵ and also occasionally by statute. This doctrine of legal implication is sufficiently abstruse, and the soundest lawyers are often at fault,

¹ *Field v. Lelean*, 30 L. J., Ex. 168, per Ex. Ch.; 6 H. & N. 617, S. C.; overruling *Spartali v. Benecke*, 10 Com. B. 212. See *Godts v. Rose*, 17 Com. B. 229.

² *Bywater v. Richardson*, 1 A. & E. 508; 3 N. & M. 748, S. C. See *Smart v. Hyde*, 8 M. & W. 723; and *Foster v. Mentor Life Assur. Co.*, 3 E. & B. 48.

³ *Hutton v. Warren*, 1 M. & W. 475, per Parke, B.; *Gibson v. Small*, 4 H. of L. Cas. 397, per id.

⁴ Ante, § 5.

⁵ *Gibson v. Small*, 4 H. of L. Cas. 396, 397, per Parke, B.

when called upon to apply it to the varying transactions of life. On some matters, however, of frequent occurrence the law has been settled by judicial decisions.

§ 1171. For instance, it is now an undoubted principle of *marine insurance* § 1069 that in every voyage-policy, whether on a ship or on goods, or on freight, or on salvage,¹ a warranty of sea-worthiness² at the commencement of the risk is, in the absence of express stipulation, implied,³ that is, the law annexes an incident in the shape of a condition, either that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it, or that she had been seaworthy when the voyage commenced, if the insurance is on a vessel already at sea. So, other conditions are equally implied; as not to deviate unnecessarily from the usual course of the voyage, except in order to save life,⁴—to commence it in a reasonable time,—to disclose all material circumstances;⁵ and the non-performance of these conditions avoids the policy, whether it arises from fraudulent motives or not.⁶ But the law of England implies no warranty that the lighters employed to land the cargo at the port of discharge shall be seaworthy;⁷ none that the vessel shall continue seaworthy after the voyage has commenced; none that the crew, if originally competent, shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none that pilots shall be taken on board at proper places, if the voyage has already commenced, unless, perhaps, where required by Act of Parliament;

¹ *Knill v. Hooper*, 2 H. & N. 277.

² This is a relative term, depending on the nature of the ship, as well as of the voyage insured; and in an action on a policy, parol evidence as to these facts is admissible to show the amount of seaworthiness implied; *Burges v. Wickham*, 3 B. & S. 669; 33 L. J., Q. B. 17, S. C.; *Clapham v. Langton*, 34 L. J., Q. B. 46, per Ex. Ch.; 5 B. & S. 729, S. C. See, also, *Bouillon v. Lupton*, 15 Com. B., N. S. 113; and *Daniels v. Harris*, 44 L. J., C. P. 1; 10 Law Rep., C. P. 1, S. C.

³ See *Quebec Marine Ins. Co. v. Commer. Bk. of Canada*, 3 Law Rep., P. C. 234; 39 L. J., P. C. 53, S. C.

⁴ *Scaramanga v. Stamp*, 49 L. J., C. P. 674; L. R., 5 C. P. D. 295, S. C., per Ct. of App.; affirm. S. C., 48 L. J., C. P. 478; & L. R., 4 C. P. D. 316.

⁵ See *Proudfoot v. Montefiore*, 2 Law Rep., Q. B. 511; 8 B. & S. 510, S. C.

⁶ *Gibson v. Small*, 4 H. of L. Cas. 397, 398; 16 Q. B. 158, S. C., in Ex. Ch., per Parke, B. See, also, *Biccard v. Shepherd*, 14 Moo. P. C. R. 471.

⁷ *Lane v. Nixon*, 1 Law Rep., C. P. 412; 1 H. & R. 585, S. C.

none on an insurance for one voyage out and home, that the ship shall be seaworthy on the return voyage; although these might all be very reasonable conditions to be imposed on the assured for the benefit of the underwriters, and which have been by law or custom imposed upon underwriters in America.¹ Neither, in the case of a time-policy, does the law imply any warranty or condition that the ship should be seaworthy either at the date of the insurance,² or at the commencement of the voyage during which the policy attaches;³ and this, too, as it would seem, although the ship should be an outward-bound vessel, lying in a British port where the owner actually resides.⁴ Again, in a voyage-policy on goods no warranty can be implied that the goods are seaworthy for such voyage.⁵

§ 1172. In every contract by a common carrier, or by a ship-owner,⁶ whether a common carrier or not, for the carriage for hire, whether by land⁷ or by water,⁸ of *goods*, which term includes live animals,⁹ the law implies an insurance on his part, that,—unless prevented either by “the act of God or by the public enemies of the Crown,” or by the “proper vice” of the animal, or by the inherent quality of the article,¹⁰—he will safely deliver at its destination the

¹ *Gibson v. Small*, 4 H. of L. Cas. 398, per Parke, B. See, also, *Biccard v. Shepherd*, 14 Moo. P. C. R. 471.

² *Gibson v. Small*, 4 H. of L. Cas. 353; *Small v. Gibson*, 16 Q. B. 128, S. C., in Ex. Ch.

³ *Gibson v. Small*, 4 H. of L. Cas. 407, per Parke, B., 422, 423, per Ld. Campbell; *Jenkins v. Heycock*, 8 Moo. P. C. R. 351; *Michael v. Tredwin*, 17 Com. B. 551; *Dudgeon v. Pembroke*, 43 L. J., Q. B. 220; 9 Law Rep., Q. B. 581. S. C.; L. R., 1 Q. B. D. 96, S. C. in Ex. Ch.; L. R., 2 App. Cas. 284, S. C. in Dom. Proc.; 46 L. J., Q. B. 409, S. C.

⁴ *Thompson v. Hopper*, 25 L. J., Q. B. 240; 6 E. & B. 172, S. C., Erle, J., diss.; *Fawcus v. Sarsfield*, 25 L. J., Q. B. 249; 6 E. & B. 192, S. C., Erle, J., diss.

⁵ *Koebel v. Saunders*, 33 L. J., C. P. 310; 17 Com. B., N. S. 71, S. C.

⁶ *Nugent v. Smith*, Law Rep., 1 C. P. D. 423; 45 L. J., C. P. 697, S. C.

⁷ *Riley v. Horne*, 5 Bing. 533.

⁸ *Lyon v. Mells*, 5 East, 428; *Liver Alkali Co. v. Johnson*, 9 Law Rep., Ex. 338; 43 L. J., Ex. 216, S. C.

⁹ *McManus v. Lanc. & Yorks. Ry. Co.*, 4 H. & N. 327; 28 L. J., Ex. 358; *Nugent v. Smith*, L. R., 1 C. P. D. 423; 45 L. J., C. P. 697, S. C.; *Tattershall v. Nat. Steamship Co.*, L. R., 12 Q. B. D. 297; 53 L. J., Q. B. 332, S. C.

¹⁰ *Kendall v. Lond. & S. W. Ry. Co.*, 7 Law Rep., Ex. 373; 41 L. J., Ex. 184, S. C.; *Gt. W. Ry. Co. v. Blower*, 41 L. J., C. P. 268; 7 Law Rep., C. P. 655, S. C. nom. *Blower v. Gt. W. Ry. Co.*; *Nugent v. Smith*, L. R., 1 C. P.

property entrusted to his care. The carrier by land, therefore, warrants that his carriage is roadworthy, and the ship owner that his ship is seaworthy.¹ These stringent laws, however, do not extend to forwarding agents, as distinguished from common carriers, at least when they have made special contracts with their employers;² neither do they apply to the carriers of *passengers*, who,—although bound to exercise the utmost care and skill in the conduct of their business,³ and responsible to their employers for every accident occasioned by negligence however slight,⁴—do not impliedly warrant either the roadworthiness of their vehicles, or the seaworthiness of their vessels, and will not be liable for injuries caused by mere *latent* defects.⁵

§ 1173. It may further be laid down as a general proposition, § 10697 that if any person, for a valuable consideration, engages with another to allow him the use of a particular article to be applied to a certain purpose, he impliedly contracts that the article shall be reasonably fit for that purpose. A man, therefore, who causes a building to be erected for viewing a public exhibition, and admits persons on payment of money to seats in the building, impliedly undertakes that due care has been exercised in the erection; and if, in consequence of the careless or improper construction of the stand, it falls, and the visitors sustain injury, he is liable to an action, though he may be personally free from negligence, and may have employed a competent builder.⁶ This doctrine, however, is

D. 423; 45 L. J., C. P. 697, S. C. by Ct. of App., overruling S. C., L. R., 1 C. P. D. 19; and 45 L. J., C. P. 19, S. C.

¹ *Kopitoff v. Wilson*, 45 L. J., Q. B. 436; L. R., 1 Q. B. D. 377, S. C.; *Cohn v. Davidson*, L. R., 2 Q. B. D. 455; S. C. nom. *Cohen v. Davidson*, 46 L. J., Q. B. 395; *Steel v. State Line Steamship Co.*, L. R., 3 App. Cas. 72, per Dom. Proc. See, also, *Tattershall v. Nat. Steamship Co.*, L. R., 12 Q. B. D. 297; 53 L. J., Q. B. 332, S. C.; and ante, § 187.

² *Scaife v. Tarrant*, 44 L. J., Ex. 36; & 235 in Ex. Ch.; S. C. nom. *Scaife v. Farrant*, 10 Law Rep., Ex. 358, per Ex. Ch.

³ This doctrine was applied to a job-master who had let out a carriage which broke down, in *Hyman v. Nye*, L. R., 6 Q. B. D. 685.

⁴ See *John v. Bacon*, 5 Law Rep., C. P. 437; *Simpson v. Lond. Gen. Omnibus Co.*, 42 L. J., C. P. 112; 8 Law Rep., C. P. 390, S. C.

⁵ *Readhead v. Midl. Ry. Co.*, 36 L. J., Q. B. 181; S. C., 2 Law Rep., Q. B. 412; and 8 B. & S. 371; S. C. in Ex. Ch., 4 Law Rep., Q. B. 379; 38 L. J., Q. B. 169; and 9 B. & S. 519; *Buxton v. North East. Ry. Co.*, 9 B. & S. 824; *Ingalls v. Bills*, 9 Mete. 1.

⁶ *Francis v. Cockrell*, 5 Law Rep., Q. B. 184; 39 L. J., Q. B. 113; (3869)

one, which some at least of the judges seem loth to recognise; and, therefore, where an attempt was made to apply it to the case of a stable-keeper, who, having taken charge for reward of a gentleman's carriage, placed it in a coach-house, which had just before been built for him by a competent builder, but which fell down through some defect in its construction, the Court of Queen's Bench,—drawing a misty distinction between a temporary shed and a permanent building,—refused to make the stable-keeper liable for injuries caused to the carriage by the fall of the coach-house.¹

§ 1174. In contracts for the *sale of estates*,² whether freehold or leasehold, the law, in the absence of an express stipulation to the contrary, implies an undertaking on the part of the vendor that he will make out a good title,³ and an undertaking on the part of the vendee, that, if the title prove defective, the damages to which he shall be entitled, shall be limited to the expenses actually incurred in the the investigation, and shall be merely nominal for the loss of the bargain.⁴ If, indeed, it shall turn out that the vendor has been guilty of any fraudulent misrepresentation or concealment, or that he has contracted to sell an estate in which he has no reasonable ground for believing that he has any interest whatever,⁵ or if, though able to furnish a marketable title, he has simply declined to do so, or to take the steps necessary for giving

S. C. in Ex. Ch., 5 Law Rep., Q. B. 501; 39 L. J., Q. B. 291; and 10 B. & S. 950.

¹ *Searle v. Laverick*, 9 Law Rep., Q. B. 122; 43 L. J., Q. B. 43, S. C.

² See the Conveyancing and Law of Property Act, 1881, 44 & 45 V., c. 41, §§ 3, 7.

³ *Souter v. Drake*, 5 B. & Ad. 992; 3 N. & M. 40, S. C.; *Doe v. Stanion*, 1 M. & W. 695, 701, per Parke, B.; *Hall v. Betty*, 4 M. & Gr. 410; 5 Scott, N. R. 508, S. C.; *Worthington v. Warrington*, 5 Com. B. 635. These cases overrule *George v. Pritchard*, Ry. & M. 417. See *Kintrea v. Perston*, 1 H. & N. 357.

⁴ *Flureau v. Thornhill*, 2 W. Bl. 1078; *Walker v. Moore*, 10 B. & C. 416; *Robinson v. Harman*, 1 Ex. R. 855, per Parke, B.; *Bain v. Fothergill*, 6 Law Rep., Ex. 59; 40 L. J., Ex. 34, S. C.; 7 Law Rep., H. L. 158; and 43 L. J., Ex. 243, S. C. in Dom. Proc.; *Worthington v. Warrington*, 8 Com. B. 134; *Pounsett v. Fuller*, 17 Com. B. 660; *Sikes v. Wild*, 30 L. J., Q. B. 325; 1 B. & S. 587, S. C.; aff. in Ex. Ch., 4 B. & S. 421.

⁵ *Hopkins v. Grazebrook*, 6 B. & C. 31; 9 D. & R. 22, S. C.; *Robinson v. Harman*, 1 Ex. R. 850. See *Sikes v. Wild*, 30 L. J., Q. B. 325; 1 B. & S. 587, S. C.; aff. in Ex. Ch., 4 B. & S. 421.

possession,¹ then the case will fall within the general rule of law, that where a person makes a contract and afterwards breaks it, he must pay the whole damage sustained by the party with whom he contracts.² The same result would also follow, should the question arise on an executed contract, and the indenture contain a covenant for quiet enjoyment.³

§ 1175. An agreement to grant a lease contains an implied § 1071 undertaking on the part of the intended lessor that he has title to grant a valid lease:⁴ and in every *demise* of real property, whether by deed or parol, the law annexes conditions that the lessor will give possession of the premises to the lessee,⁵ and that, provided the lessor's own interest in them continues,⁶ the lessee shall have quiet enjoyment of them,⁷ including an inalienable right to kill and take ground game thereon,⁸ and shall not be evicted during the term.⁹ No undertaking, however, for good title is implied by law from a demise by parol;¹⁰ nor is any warranty

¹ *Engel v. Fitch*, 3 Law Rep., Q. B. 314; and 9 B. & S. 95; S. C. nom. *Engell v. Fitch*, 37 L. J., Q. B. 145; 4 Law Rep., Q. B. 659, S. C. in Ex. Ch.; 10 B. & S. 738; and 38 L. J., Q. B. 304. See *Godwin v. Francis*, 39 L. J., C. P. 121; 5 Law Rep., C. P. 295, S. C.

² In *Bain v. Fothergill*, 7 Law Rep., H. L. 207; 43 L. J., Ex. 243, S. C.; Ld. Chelmsford expressed an opinion, that even if a man contracts for the sale of real estate, knowing that he has no title, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses incurred by an action for breach of contract; he can only obtain other damages by an action for deceit. *Sed qu.*

³ *Lock v. Furze*, 1 Law Rep., C. P. 441; 35 L. J., C. P. 141, S. C.; H. & R. 379, S. C., in Ex. Ch.

⁴ *Stranks v. St. John*, 36 L. J., C. P. 118; 2 Law Rep., C. P. 376, S. C.

⁵ *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Ex. R. 775; *Drury v. Macnamara*, 5 E. & B. 612.

⁶ *Penfold v. Abbott*, 32 L. J., Q. B. 67; *Adams v. Gibney*, 6 Bing. 656.

⁷ *Bandy v. Cartwright*, 8 Ex. R. 913; *Hall v. City of Lond. Brewery Co.*, 31 L. J., Q. B. 257; 2 B. & S. 737, S. C. See *Howard v. Maitland*, L. R., 11 Q. B. D. 695, as to what constitutes a breach of a covenant for quiet enjoyment.

⁸ 43 & 44 V., c. 47, §§ 1, 3.

⁹ Per Parke, B., in *Sutton v. Temple*, 12 M. & W. 64; and in *Hart v. Windsor*, *id.* 85.

¹⁰ *Bandy v. Cartwright*, Ex. R. 913; overruling contrary dicta by Parke, B., in *De Medina v. Norman*, 9 M. & W. 827; and *Sutton v. Temple*, 12 M. & W. 64. The law in Ireland with respect to this subject is now contained in § 41 of 23 & 24 V., c. 154, Ir., which enacts that every lease, made since 1st Jan., 1861, shall, unless otherwise expressly provided thereby, (see

implied that the subject-matter of a lease,—whether it consist of a house or of land,—shall, either at the commencement, or during the continuance, of the term, be in a proper state for habitation or cultivation, or that, in other respects, it shall be reasonably fit for the purpose for which it is taken.¹ Neither does the law imply, from the relation of landlord and tenant, any obligation on the part of the landlord to do substantial repairs on notice;² and even where the landlord is bound by special agreement to keep the premises in repair during the tenancy, there is no implied condition that the tenant may quit if the repairs be not done.³

§ 1176. In the case, however, of letting a *ready furnished* house, § 1071 the law imposes an obligation upon the landlord to let the premises in a reasonably habitable state; and therefore, if the furniture be insufficient in quantity, or defective in quality, if the beds swarm with vermin, or the drains be out of order, or the house be infected with contagion, the tenant may quit without notice, unless, perhaps, in the event of his having had an opportunity of inspecting the premises by himself or his agent before entering on the occupation.⁴ In every demise, which contains no express provision with respect to delivering up the premises, the law implies a contract on the

Leonard *v.* Taylor, 1 R., 8 C. L. 300), imply an agreement by the landlord that he has a good title, and that the tenant shall have quiet enjoyment. § 42 also enacts, that every such lease shall, unless otherwise expressly provided thereby, imply an agreement by the tenant to pay the rent, and all taxes and impositions payable by the tenant, and to keep the premises in good and substantial repair, and to deliver them up in such repair on the determination of the lease, accidents by fire without the tenant's default excepted.

¹ Sutton *v.* Temple, 12 M. & W. 52; Hart *v.* Windsor, *id.* 68; Murray *v.* Mace, 1 R., 8 C. L. 396; Manchester Bonded Warehouse Co. *v.* Carr, L. R., 5 C. P. D. 507; 49 L. J., C. P. 809, S. C. These cases overrule Edwards *v.* Etherington, Ry. & M. 268; 7 D. & R. 117, S. C.; Collins *v.* Barrow, 1 M. & Rob. 112; Salisbury *v.* Marshall, 4 C. & P. 65. In Erskine *v.* Adeane, 42 L. J., Ch. 395, Ld. Romilly held "that every landlord warranted his tenant that he would not keep noxious things (such as yew trees) near the tenant's estate," but this ruling was reversed by the Lds. Js. on appeal, as being obviously contrary to the law. 8 Law Rep., Ch. Ap. 756; 42 L. J., Ch. 835, S. C.

² Gott *v.* Gandy, 2 E. & B. 845.

³ Surplice *v.* Farnsworth, 7 M. & Gr. 576.

⁴ Smith *v.* Marrable, 11 M. & W. 5; commented on by Ld. Abinger, in Sutton *v.* Temple, 12 M. & W. 60, 61; and approved in Wilson *v.* Finch Hatton, L. R., 2 Ex. D. 336; 46 L. J., Ex. 489, S. C.

part of the tenant not only to go out of them at the termination of the tenacy, but to restore the absolute possession to the landlord.¹

§ 1177. On the sale of a *specific ascertained chattel*, the law of England,—unlike the Roman,² the French,³ the Scotch,⁴ and, in part, the American law,⁵—does not annex to the contract any implied warranty of *title*,⁶ but a warranty may be inferred in such case, either from the usage of trade, or from the declaration or conduct of the vendor being such as to lead to the conclusion that he sold the property as “his own,” or from the fact of the articles being bought in a shop professedly carried on for the sale of goods.⁷ The rule, therefore, such as it is, has been nearly eaten up by the exceptions.⁸ With respect to *executory* contracts of purchase and sale, where the subject is *unascertained*, and is afterwards to be conveyed, the law would probably imply that both parties meant that a good title to that subject should be transferred, in the same manner as it would imply, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept it if he discovered the defect of title before delivery; and if he did accept, and the goods were recovered from him, he would not be bound to pay for them, or having paid, he would be entitled to recover back the price, as on a consideration which had failed.⁹

¹ Henderson v. Squire, 4 Law Rep., Q. B. 170; 38 L. J., Q. B. 73; and 10 B. & S. 183, S. C.

² See Domat, bk. 1, tit. 2, § 2, art. 3.

³ Code Civil, c. 4, § 1, art. 1603.

⁴ Bell on Sale, 94.

⁵ Defreeze v. Trumper, 1 Johns. 274; Rew v. Barber, 3 Cowen, 272; Broom, Max. 628.

⁶ Morley v. Attenborough, 3 Ex. R. 500, 510, per Parke, B.; Ormrod v. Huth, 14 M. & W. 664, per Tindal, C. J.; Hall v. Conder, 2 Com. B., N. S. 40; Chapman v. Speller, 14 Q. B. 621; Bagueley v. Hawley, 2 Law Rep., C. P. 625; 36 L. J., C. P. 328, S. C., nom. Bagueley v. Hawley.

⁷ Morley v. Attenborough, 3 Ex. R. 511—513, per Parke, B.; Eicholz v. Bannister, 17 Com. B., N. S. 708; 34 L. J., C. P. 105, S. C.

⁸ Sims v. Marryat, 17 Q. B. 291, per Ld. Campbell; Eicholz v. Bannister, 17 Com. B., N. S. 723, per Erle, C. J., and 724, per Byles, J.

⁹ Morley v. Attenborough, 3 Ex. R. 509, 510, per Parke, B. It is still an undecided point whether, on the sale of a *copyright*, the law would imply a warranty of title. See Sims v. Marryat, 17 Q. B. 281.

§ 1178. Upon a sale of merchandise, which the buyer has no opportunity of inspecting, the law implies a condition that the article shall fairly and reasonably answer the description in the contract;¹ but where *goods* are sold under circumstances which afford the purchaser an opportunity of inspecting either the bulk or the sample, the maxim of *caveat emptor* is generally applicable, and the law does not imply any warranty,² either as to their merchantable quality,³ or their value,⁴ or their fitness for the purpose for which they were bought,⁵ unless the defect be of such a nature as not to be readily discoverable by the inspection of the bulk or the sample.⁶ This doctrine even extends to the sale of food for the use of man,⁷ unless the vendor be a butcher, baker, vintner, or common victualler, in which case he will perhaps be presumed to have warranted that the provisions supplied by him were sound and wholesome.⁸ In a recent case, however, where a cattle-dealer had sent to *market* a herd of pigs, which he had reason

¹ *Wieler v. Schillizzi*, 17 Com. B. 619; *Bigge v. Parkinson*, 31 L. J., Ex. 301; 7 H. & N. 955, S. C.; *Beer v. Walker*, 46 L. J., C. P. 677.

² The Scotch law on this subject is now embodied in § 5 of 19 & 20 V., c. 60, which enacts, that "where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same was defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose."

³ Independent, however, of the law of implied warranty, a party is not bound to accept and pay for chattels, unless they really answer the *description* of the articles which the vendor professed to sell, and the purchaser intended to buy. *Gompertz v. Bartlett*, 2 E. & B. 849; *Nichol v. Godts*, 10 Ex. R. 191; *Young v. Cole*, 3 Bing. N. C. 724; 4 Scott, 489, S. C.; *Hall v. Conder*, 2 Com. B., N. S. 41; *Josling v. Kingsford*, 32 L. J., C. P. 94; 13 Com. B., N. S. 447, S. C.

⁴ *Kirkpatrick v. Gowan*, 1 R., 9 C. L. 521. See *Smith v. Hughes*, 6 L. R., Q. B. 597.

⁵ *Parkinson v. Lee*, 2 East, 314; recognised by Parke, B., in *Sutton v. Temple*, 12 M. & W. 64; and explained by Tindal, C. J., in *Shepherd v. Pybus*, 3 M. & Gr. 880.

⁶ *Mody v. Gregson*, 38 L. J., Ex. 12, per Ex. Ch.; 4 Law Rep., Ex. 49, S. C.

⁷ *Burnby v. Bollett*, 16 M. & W. 644; *Le Neuville v. Nourse*, 3 Camp. 351; *Emmerton v. Matthews*, 31 L. J., Ex. 139; 7 H. & N. 586, S. C.

⁸ *Burnby v. Bollett*, 16 M. & W. 649, 654, 655, per Parke, B.

to believe were diseased, the court held that, although by thus publicly exposing the animals for sale, his conduct might have been morally or even statutably,¹ culpable, he was not liable to an action at the suit of the purchaser for false representation, as the pigs were sold under an express condition that they were to be "taken with all faults," and without any warranty.²

§ 1179. Where a *known ascertained chattel* is specifically ordered by the buyer, the manufacturer who executes the order does not thereby impliedly warrant, that the article supplied by him shall be fit for the special purpose to which it is intended to be applied.³ But where the purchaser, instead of depending on his own judgment, may fairly be supposed to rely on the skill and knowledge of the vendor, the law implies a warranty that the chattel furnished shall be reasonably fit for the purpose for which it is known to be ordered;⁴ and no exception will be recognised in the case of latent undiscoverable defects.⁵ This doctrine will apply in a special manner to cases, where the articles are supplied directly by the manufacturer.⁶ It will also extend to natural products as well as to manufactured articles; and therefore, where a dealer in seed had sold some rape which he knew the purchaser required for seed, the court held that the contract contained an implied warranty that the rape was good growing seed, fit for germination.⁷

§ 1179A. On a sale of goods by a manufacturer of such goods,

¹ See 41 & 42 V., c. 74, § 61; and 32 & 33 V., c. 70, § 57.

² Ward v. Hobbs, L. R., 4 App. Cas. 13, per Dom. Proc.; 48 L. J., Q. B. 281, S. C.

³ Chanter v. Hopkins, 4 M. & W. 399; Ollivant v. Bayley, 5 Q. B. 288; recognised in Parsons v. Sexton, 4 Com. B. 908; Prideaux v. Bunnnett, 1 Com. B., N. S. 613; Hall v. Conder, 2 Com. B., N. S. 41.

⁴ Bigge v. Parkinson, 31 L. J., Ex. 301, 303; 7 H. & N. 955, 961, S. C.; Brown v. Edgington, 2 M. & Gr. 279, 290; 2 Scott, N. R. 496, S. C.; recognised in Sutton v. Temple, 12 M. & W. 64; Mallan v. Radloff, 17 Com. B., N. S. 588.

⁵ Randall v. Newson, 46 L. J., Q. B. 259; L. R., 2 Q. B. D. 102, S. C., per Ct. of App., reversing S. C. in Q. B. D., 45 L. J., Q. B. 364.

⁶ Shepherd v. Pybus, 3 M. & Gr. 868; 4 Scott, N. R. 434, S. C.; Sutton v. Temple, 12 M. & W. 64, per Parke, B.

⁷ Shields v. Cannon, 16 Ir. Law R., N. S. 588; Jones v. Just, 37 L. J., Q. B. 89; 3 Law Rep., Q. B. 197; and 9 B. & S. 141, S. C.

who is not otherwise a dealer in them, there is, in the absence of any usage, in the particular trade or as regards the particular goods, to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make.¹

§ 1180. Since the commencement of the year 1864, the vendor § 1073A of any article with a trade mark or description upon it, is, by virtue of "The Merchandise Marks Act, 1862," presumed to have contracted that the mark is genuine and the description true, "unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee."²

§ 1181. The legal effect of contracts for the sale of patents § 1073B has been the subject of much discussion in Westminster Hall; but it is now determined that the law implies no warranty in such a contract, either that the vendor was the true and first inventor within the Statute of James, or that the invention was either useful or new.³

§ 1182. From the ordinary relation of *master* and *domestic* or *menial servant*, no contract, and therefore no duty, can be implied on the part of the master, to protect the servant against any injury arising, either from the negligence of another servant, or from the defective condition of the master's property, unless the personal negligence or other misconduct of the master can be shown to have caused, or, at least to have materially contributed to, the accident.⁴ This doctrine,—which, until the year 1880, was held applicable in its entirety to every employer of manual labour,—is now confined to the masters of domestic or menial servants. The liability of all other employers to make compensation for personal injuries suffered by workmen in their service, must, from the commencement of

¹ *Johnson v. Raylton*, L. R., 7 Q. B. D. 438, per Ct. of App., Bramwell, L. J., diss.; 50 L. J., Q. B. 753, S. C.

² 25 & 26 V., c. 88, §§ 19, 20.

³ *Hall v. Conder*, 2 Com. B., N. S. 22; *Smith v. Neale*, id. 67; *Notor v. Brooks*, 7 H. & N. 499; *Trotman v. Wood*, 16 Com. B., N. S. 479. See, also, *Jackson v. Hill*, L. R., 13 Q. B. D. 618.

⁴ *Priestly v. Fowler*, 3 M. & W. 1; *Seymour v. Maddox*, 16 Q. B. 326. See *Griffiths v. Lond. & St. Kath. Docks Co.*, L. R., 13 Q. B. D. 259; 53 L. J., Q. B. 504, S. C.; where held by Ct. of App. that the statement of claim must allege, not only that the master knew, but that the servant did not know, of the danger.

1881 to the end of 1887,¹ depend on the construction which the courts of law may put upon the somewhat vague language of "The Employers' Liability Act, 1880."² The most important sections of that statute are the first three, which are too long to insert in this work, but which deserve attentive study. Suffice it here to remark, 1st, that the Act does not apply, either to domestic servants, or to seamen; 2nd, that the expression "employer," as used therein, "includes a body of persons corporate or unincorporate;" and 3rd, that the expression "workman" includes a railway servant, and any person of any age, who,—being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or *otherwise engaged in manual labour*,—has entered into or works under a contract with an employer, whether such contract be express or implied, oral or in writing, and be a contract of service, or a contract personally to execute any work or labour.³ Notwithstanding the above elaborate definition, this last term has been found defective in practice; and the judges have felt themselves bound to hold,—contrary to the obvious intention of the Legislature,—that the Act did not apply to a case, where the party injured was an omnibus conductor.⁴

§ 1182A. The law, which governs the liability of shipowners for injuries sustained by their crew, is now regulated in great measure by "The Merchant Shipping Act, 1876;" and if any illness or other damage is alleged to have occurred to a seaman from sending a ship to sea in an unseaworthy state, the burthen of proving misconduct on the part of his employer does not rest on the seaman, but the shipowner is obliged to show that he has used "all reasonable means to insure the seaworthiness of the ship."⁵

¹ 43 & 44 V., c. 42, §§ 9 & 10.

² 43 & 44 V., c. 42.

³ See 38 & 39 V., c. 90, § 10; and 43 & 44 V., c. 42, § 8.

⁴ *Morgan v. Lond. Gen. Omnibus Co.*, L. R., 12 Q. B. D. 203, per Ct. of App.; 53 L. J., Q. B. 352, S. C.

⁵ 39 & 40 V., c. 80, § 5, enacts, that "In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the

§ 1183. When a skilled labourer, artisan, or artist enters into an engagement with an employer to work in the art which he practises, he impliedly warrants that he possesses skill reasonably competent to the task he undertakes. Thus, if an apothecary, a surveyor, a watchmaker, a cook, an auctioneer,¹ or a solicitor, be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. No express promise or representation is necessary, for the public profession of an art is in itself a representation and undertaking to all the world that the professor possesses the requisite ability and knowledge.² It follows from this rule, that if the party employed proves to be incompetent, he may, though engaged for a term, be immediately discharged,³ and his employer may also proceed against him for any loss occasioned by his ignorance or incapacity.⁴ § 1074A

§ 1184. In all contracts to perform personal services,—as, for instance, in a covenant by an apprentice to serve his master for a certain period,—however absolute and unconditional may be the terms employed, the law implies an exception in the event of the contractor becoming disabled by the act of God, as by death or permanent illness, from doing what he has undertaken to do.⁵ So, the service of a farm-bailiff will impliedly terminate on the death of his master, unless a special stipulation to the contrary be inserted in the contract.⁶ So, an undertaking by an author to write a book, by an artist to paint a picture, or by a musician to play at a § 1074B

ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same: Provided that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state, where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable."

¹ *Kavanagh v. Cuthbert*, 1 R., 9 C. L. 136.

² *Harmer v. Cornelius*, 28 L. J., C. P. 88, per Willes, J.; Com. B., N. S. 246, S. C.

³ *Id.* 28 L. J., C. P. 85; 5 Com. B., N. S. 236, S. C.

⁴ *Jenkins v. Betham*, 15 Com. B. 188.

⁵ *Boast v. Firth*, 38 L. J., C. P. 1; 4 Law Rep., C. P. 1, S. C.

⁶ *Farrow v. Wilson*, 38 L. J., C. P. 326; 4 Law Rep., C. P. 744, S. C.

concert, is subject to an implied condition that non-fulfilment of the engagement caused by illness shall not be regarded as a breach of the contract.¹

§ 1185. When a man makes a contract as agent for another § 1074c person, the law implies a warranty on his part that he has authority to bind his principal; and if it turns out that he has made any misrepresentation in point of fact, as distinguished from a mere mistake in point of law,² and that he really has no such authority as he claims to have, he may be sued for the damages necessarily occasioned by this breach of warranty, though he may have acted under the bonâ fide belief that he was authorised as agent to make the contract.³ On the same principle, where two directors of a public company had informed the company's bankers, that "the manager" had authority to draw cheques upon the account of the company, the court held, that, such not being the fact, the directors themselves were personally liable for the advances made by the bank on cheques so drawn.⁴

§ 1186. When goods are deposited as security for the repay- § 1074d ment of a loan on a certain day, the law implies from the nature of the transaction that the pawnee shall have power to sell the goods in default of payment at the stipulated period.⁵ But it must

¹ *Robinson v. Davison*, 6 Law Rep., Ex. 269; 40 L. J., Ex. 172, S. C.

² *Beattie v. Ld. Ebury*, 7 Law Rep., Ch. App. 777, 800—803, per Mellish, L. J.; 41 L. J., Ch. 804, S. C.; *Rashdall v. Ford*, 2 Law Rep., Eq. 750. *Hollman v. Pullin*, 1 Cab. & El. 254, per Williams, J.

³ *West London Com. Bk. v. Kitson*, L. R., 13 Q. B. D. 360, S. C.; 53 L. J., Q. B. 218; S. C. Id. 345, per Ct. of App.; *Collen v. Wright*, 26 L. J., Q. B. 147; 7 E. & B. 301, S. C.; 27 L. J., Q. B. 215; 8 E. & B. 647, S. C., in Ex. Ch.; *Richardson v. Williamson*, 6 Law Rep., Q. B. 276; 40 L. J., Q. B. 145, S. C.; *Weeks v. Propert*; 42 L. J., C. P. 129; *Randell v. Trimen*, 18 Com. B. 786; *Simons v. Patchett*, 26 L. J., Q. B. 195; 7 E. & B. 568, S. C. See *Worthington v. Sudlow*, 31 L. J., Q. B. 131; *Maxwell v. Parnell*, I. R., 1 C. L. 234.

⁴ *Cherry v. Colonial Bk. of Australasia*, 38 L. J., P. C. 49; 3 Law Rep., P. C. 24, S. C. See *Beattie v. Ld. Ebury*, 44 L. J., Ch. 20, in Dom. Proc.

⁵ *Pigot v. Cubley*, 15 Com. B., N. S. 701; 33 L. J., C. P. 134, S. C.; *Johnson v. Stear*, 15 Com. B., N. S. 330; *Pothonier v. Dawson*, Holt, N. P. R. 383, per Gibbs, C. J.

be carefully remembered that this doctrine is inapplicable to a case, where a man holds another person's goods on a simple claim of lien; for a *lien*, unlike a *pledge*, gives only a right of retention;¹ and if the goods detained be sold, though it be to meet current expenses, the lien,—except in the case of an innkeeper who now enjoys to a limited extent a statutable right of sale²,—is thereby effectually destroyed.³

§ 1187. In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be *not repugnant to or inconsistent with* the contract; for otherwise, it would not go to interpret and explain, but to contradict, what is written.⁴ In order to establish an inconsistency between the written agreement and the custom, it is not necessary that the former should *in express terms* exclude the latter; but if it can clearly be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by the custom, no evidence respecting it can be received.⁵ For instance, suppose the custom of the country should require the tenant to plough, sow, and manure a certain portion of the demised land in the last year, and should entitle him, on quitting, to receive from the landlord a reasonable compensation for his labour, seeds, and manure; evidence of such a custom would be rejected, had the tenant covenanted to plough, sow, and manure, in accordance with the custom, he being paid on quitting for the *ploughing*; because here the principle, "*expressum facit cessare tacitum*," would apply, and the

¹ See *Donald v. Suckling*, 35 L. J., Q. B. 232; 7 B. & S. 783, S. C.; and *Halliday v. Holgate*, 3 Law Rep., Ex. 299; 37 L. J., Ex. 174, S. C.

² 41 & 42 V., c. 38.

³ *Mulliner v. Florence*, L. R., 3 Q. B. D. 484, per Ct. of App; 47 L. J., Q. B. 700, S. C.

⁴ *Holding v. Pigott*, 7 Bing. 465, 474; 5 M. & P. 427, S. C.; *Clarke v. Roystone*, 13 M. & W. 752; *Yeats v. Pim*, Holt, N. P. R. 95; nom. *Yates v. Pym*, 6 Taunt. 446, S. C.; *Trueman v. Loder*, 11 A. & E. 589; 3 P. & D. 267, S. C.; *Muncey v. Dennis*, 1 H. & N. 216; *Suse v. Pompe*, 8 Com. B., N. S. 538. See *Buckle v. Knoop*, 36 L. J., Ex. 49.

⁵ *Hutton v. Warren*, 1 M. & W. 477, per Parke, B. See *Clarke v. Roystone*, 13 M. & W. 752.

language of the lease would be deemed equivalent to a stipulation, that the lessor should pay for the ploughing, and *no more*.¹

§ 1188. In order to constitute such a custom or usage, as will be § 1076 admissible in evidence to explain the terms of a written instrument, it is not necessary that it should have been *immemorial*, or even established for a considerable period, or *uniform*, or capable of being defined with precision and accuracy.² Thus, “the custom of the country” with reference to good husbandry, means no more than that the tenant should conform to the existing prevalent usage of the country where the lands lie;³ and the general usage of trade may be imported into a contract, though proof has been given of exceptions to such usage.⁴ So, although a particular branch of trade has been only established for a year or two, parties connected with that trade will be presumed to have contracted with reference to the usages generally adopted since its existence.⁵ But, in all these cases, it is the *fact* of a general usage or practice prevailing in the particular trade or business, and not the mere judgment and opinion of the witnesses, which is admissible in evidence: and unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight.⁶

§ 1189. Whenever evidence of usage is adduced, whether it be § 1077 for the purpose of explaining the technical language of an instrument, or of annexing incidents to it, the party against whom it is offered is always at liberty to prove,—either first, the non-existence of the usage,—or secondly, its illegality or unreasonableness,—or thirdly, that, in fact, it formed no part of the agreement between

¹ 1 M. & W. 477, 478; Webb v. Plummer, 2 B. & A. 746.

² Juggomohun Ghose v. Manickchand, 7 Moo. Ind. App. Cas. 263, 2-2, per Sir J. Coleridge.

³ Legh v. Hewitt, 4 East, 154, 159, per Id. Ellenborough; Dalby v. Hirst, 1 B. & B. 224, 227, 228; 3 Moore, 536, S. C. See ante, § 318.

⁴ Vallance v. Dewar, 1 Camp. 508, per Id. Ellenborough.

⁵ Noble v. Kennoway, 2 Doug. 513, per Id. Mansfield; Robertson v. Jackson, 2 Com. B. 412.

⁶ Lewis v. Marshall, 7 M. & Gr. 744, 745, per Tindal, C. J.

the parties.¹ Indeed, if any reason exists for believing that the opposite party will rely upon usage, the evidence on these points may be given by way of *anticipation*. For instance, where the owner of goods brought an action against a carrier by sea for non-delivery of the goods to him at the port of London, and the defendant pleaded that he had delivered them at that port,—it was held first by the Court of Exchequer Chamber,² and then by the House of Lords,³ that the plaintiff might prove former dealings between himself and the defendant respecting the carriage of other goods from the defendant's London wharf to the plaintiff's place of business; as such evidence was offered, not for the purpose of extending or narrowing the contract, or in any way changing it, but with the sole view of meeting a case, which might be made on the other side to establish a custom of delivery at a wharf. The fact that the evidence consisted of instances of individual contracts, might be open to observation, but the evidence could not be rejected on that ground;⁴ and Lord Brougham observed, "A party may properly in this way anticipate objections, and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out."⁵

§ 1190. Before quitting this subject, it may be observed that § 1078 much injustice is frequently occasioned by the lax habit of admitting evidence of usage, which, though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it which was never contemplated by the parties themselves, and which is utterly at variance with their real intentions. In this view some of the highest legal authorities both in England and America concur. In *Hutton v. Warren*,⁶ though the judges of the Court of Exchequer yielded,

¹ *Bourne v. Gatliffe*, 3 M. & Gr. 684, per Alderson, B.; *Bottomley v. Forbes*, 5 Bing. N. C. 127, 128, per Tindal, C. J. See *Fawkes v. Lamb*, 31 L. J., Q. B. 98.

² *Bourne v. Gatliffe*, 3 M. & Gr. 643, 689; 3 Scott, N. R. 1, S. C.

³ *Id.*; 11 Cl. & Fin. 45, 49, 69—71; 7 M. & Gr. 850, 865, 866, S. C.

⁴ 11 Cl. & Fin. 70, per Ld. Lyndhurst, C.; 7 M. & Gr. 865, S. C.

⁵ 11 Cl. & Fin. 71; 7 M. & Gr. 866, S. C.

⁶ 1 M. & W. 475. See, also, *Anderson v. Pitcher*, 2 B. & P. 168, per Ld. Eldon.

as they were bound to do, to the precedents cited, they threw out a pretty clear intimation of their opinion, that, where formal agreements had been entered into, and especially instruments under seal, the relaxation of the strictness of the common law, which arose from the admission of evidence of usage, was unwise and unjust; and the same opinion has been expressed more than once by the Court of Queen's Bench.¹

§ 1191. "If," said Lord Denman, in pronouncing the opinion of the court on one occasion, "a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts, while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom in trade as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom."²

§ 1192. The late Mr. Justice Story has expressed the same sentiments; and as all the observations of that great and good

¹ *Johnston v. Usborne*, 11 A. & E. 557; *Trueman v. Loder*, id. 597.

² *Trueman v. Loder*, 11 A. & E. 597, 598.

judge deserve especial respect, no apology seems necessary for inserting the following passage from one of his judgments: ¹—"I ²own myself," said he, "no friend to the almost indiscriminate habit of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misrepresentations and abuses, to outweigh the well-known and well-selected principles of law. And I rejoice to find, that of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise undeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulation, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend, that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom: for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would be not only to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties."

¹ The Schooner *Reeside*, 2 Sumn. 567.

(3884)*

² Gr. Ev. § 292, n.

§ 1193. Besides the evidence of usage, strictly so called, it seems § 1081 that where a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses, present at the time of making the agreement, may be called to explain that which is per se unintelligible; such explanation not being inconsistent with the written terms.¹ On one or two occasions, even conversations between the parties when the contract was being made, have been received, in proof of the sense which they attached to the ambiguous expressions.² The principle, however, of these cases is not very clear, and no great weight should, in prudence, be attached to them.³

§ 1194. Passing now to the consideration of the second descrip- § 1082 tion of evidence, which is admissible in explanation of written instruments, it may be laid down as a broad and distinct rule of law, that *extrinsic evidence* of every *material fact*, which will enable the court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words, to *identify the persons and things* to which the instrument refers, must of necessity be received.⁴ Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter.⁵ With this view, extrinsic evidence must be admissible of all the circumstances surrounding

¹ Sweet v. Lee, 3 M. & Gr. 452, 460.

² Birch v. Depeyster, 1 Stark. R. 210, per Gibbs, C. J.; Gray v. Harper, 1 Story, R. 574; Selden v. Williams, 9 Watts, 9.

³ See Smith v. Jeffries, 15 M. & W. 561.

⁴ Doe v. Hiscocks, 5 M. & W. 367, 368, per Ld. Abinger; Shore v. Wilson, 9 Cl. & Fin. 556, Per Parke, B.; Wigr. Wills, 65; Doe v. Martin, 4 B. & Ad. 771, 785, 786, per Parke, J.; 1 N. & M. 512, S. C.; R. v. Wooldale, 6 Q. B. 549, 565, per Coleridge, J. See Macdonald v. Longbottom, 1 E. & E. 977; 28 L. J., Q. B. 293, S. C.; 29 L. J., Q. B. 256, S. C. in Ex. Ch.; Mumford v. Gething, 29 L. J., C. P. 105; 7 Com. B., N. S. 305, S. C.; Chambers v. Kelly, 1 R., 7 C. L. 231; McCollin v. Gilpin, L. R., 6 Q. B. D. 516.

⁵ Shore v. Wilson, 9 Cl. & Fin. 556, per Parke, B.; Doe v. Martin, 1 N. & M. 524, per id.; Guy v. Sharpe, 1 Myl. & K. 602, per Ld. Brougham; Wigr. Wills, 88.

the author of the instrument.¹ In the simplest case that can be put, namely, that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If an estate be conveyed by the designation of Blackacre, parol evidence must be admitted to show what property is known by that name;² and if a testator devise a house purchased of A., or a farm in the occupation of B., it must be shown by extrinsic evidence what house was purchased of A., or what farm was in B.'s occupation, before it can be shown what is devised.³

§ 1195. Again, to put an instance somewhat more complex, if the language of the instrument be alike applicable to each of several persons, parcels of land, species of goods, monuments, boundaries, writings, or circumstances; or if the terms be vague and general, or have divers meanings; parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons,⁴ or what things, were intended by the party, or to ascertain his meaning in any other respect. Thus, if the court has to determine whether a bequest of *stock* is specific or pecuniary, it will not only look to the context of the will, and the terms of the gift, as compared with those of the other bequests, but it will also receive evidence of the state of the testator's funded property.⁵ So, where a man has assigned all his household goods, and the deed stated that the particulars were set forth in an inventory annexed, the

¹ *Sweet v. Lee*, 3 M. & Gr. 466, per Tindal, C. J.; *Att.-Gen. v. Drummond*, 1 Dru. & War. 367, per Sugden, C.; *Drummond v. Att.-Gen.*, 2 H. of L. Cas. 862, per Ld. Brougham; *Att.-Gen. v. Earl of Powis*, 1 Kay, 207, per Wood, V.-C.; *King's Coll. Hospital v. Wheildon*, 18 Beav. 30; *Blundell v. Gladstone*, 1 Phil. 282, 283; *Simpson v. Margitson*, 11 Q. B. 32, per Ld. Denman; *Roden v. London Small Arms Co.*, 46 L. J., Q. B. 213.

² *Ricketts v. Turquand*, 1 H. of L. Cas. 472.

³ *Sanford v. Raikes*, 1 Mer. 653, per Sir W. Grant; *Clayton v. Ld. Nugent*, 13 M. & W. 207, per Rolfe, B.

⁴ See *Grant v. Grant*, 2 Law Rep., P. & D. 8; 39 L. J., Pr. & Mat. 17, S. C.; 39 L. J., C. P. 146, S. P. in another proceeding; 5 Law Rep., C. P. 380, S. C.; *affid. in Ex. Ch.*, 39 L. J., C. P. 272; and 5 Law Rep., C. P. 727.

⁵ *Att.-Gen. v. Grote*, 2 Russ. & Myl. 699, per Ld. Eldon; *Wigr. Wills*, 201, S. C.; *Boys v. Williams*, 2 Russ. & Myl. 689, per Ld. Brougham; *Horwood v. Griffith*, 23 L. J., Ch. 465; 4 De Gex., M. & G. 700, S. C.

fact of no inventory being found was held not to invalidate the deed, but extrinsic evidence was admitted for the purpose of identifying the chattels.¹ So, where a testator had directed in his will that all moneys which he had advanced or might advance to his children, "as will appear in a statement in my handwriting," should be brought into hotchpot, the court, in addition to other extrinsic evidence of the nature and amount of the advances, admitted an unattested document, which, after the date of the will, had been drawn up by the testator, with the apparent view of furnishing a guide to his trustees on the subject.² So, parol evidence is admissible to identify an imperfectly executed testamentary paper, if the object be to incorporate that document with a duly-attested codicil, which refers in general terms to the testator's "last will."³

§ 1196. In the case of *Goblet v. Beechey*,⁴ the controversy turned § 1083A on the word "mod," as used in the following codicil of the distinguished sculptor, Nollekens. "In case of my death all the marble in the yard, the tools in the shop, bankers, *mod* tools for carving," &c., "shall be the property of Alex. Goblet." The plaintiff contended that the word meant "models;" the defendant, who was the executor, urged that either it was an abbreviation for "moulds," or that it should be read in connexion with the words which immediately followed it, and meant "modelling tools for carving." On the one hand, it was proved, that the legatee had been in the testator's service for thirty years, and was highly esteemed by him as one of his best workmen; and statuaries were called to prove that no such tools were known as modelling tools for carving, but that the word "mod" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in the codicil were of trifling

¹ *England v. Downs*, 2 Beav. 523, 536.

² *Whateley v. Spooner*, 3 Kay & J. 542. But see *Smith v. Conder*, 47 L. J., Ch., 878, per Hall, V.-C.

³ *Allen v. Maddock*, 11 Moo. P. C. R. 427; *In re Almosnino*, 29 L. J., Pr. & Mat. 46; 1 Swab. & Trist. 508, S. C.; ante, § 1061.

⁴ 3 Sim. 24; *Wigr. Wills*, 185, S. C.

value; and he further gave in evidence, that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. Reading the codicil by the light of this extrinsic evidence, Vice-Chancellor Shadwell came to a decision that the word in question sufficiently described the testator's models; and although this decree was subsequently reversed by Lord Brougham, the reversal rested, not on the inadmissibility of any portion of the evidence, but on the ground that the models had been distinctly bequeathed by the will to another party, and that the meaning of the codicil was involved in too much obscurity to justify its operating as a revocation of the prior bequest.¹ In another case,² a testator had bequeathed to his two children the several sums of i.x.x. and o.x.x. These marks standing alone were obviously unintelligible; but the court allowed them to be explained by entrinsic evidence, showing that the deceased, when alive, had, in his business of a jeweller, used the symbols as denoting respectively 100*l.* and 200*l.*

§ 1197. In many other cases of testamentary dispositions, one § 1084 construction would be given to particular words, if children were living at the time the will was executed; and another construction, if no child was alive at that period; and here it is obvious, that unless the court were first made acquainted with the circumstances surrounding the testator, it could not with safety undertake to construe the will.³ So, if a man were to make a settlement for his children, which was involved in some ambiguity, it might be impossible for the court to solve the doubt, until evidence had been adduced respecting the state of the family of the settlor, and the circumstances in which he was placed in relation to the property dealt with.⁴ So, where an estate, a house, a mill, a factory, or a farm, has been conveyed or devised *eo nomine*, and the question is as to what was part and parcel thereof, and so passed by the deed or will, parol evidence showing the situation and limits of the property, the manner in which it was acquired, or occupied, and the

¹ 2 Russ. & Myl. 624.

² Kell v. Charnier, 23 Beav. 195.

³ Per Sugden, C., in Att.-Gen. v. Drummond, 1 Dru. & War. 367.

(3888)

⁴ Id.

like, will be always admissible.¹ So, if the language of a guarantee leaves it doubtful whether the consideration mentioned therein be a *past* or *present* consideration, and, consequently, whether the instrument be invalid or valid, parol evidence of the circumstances under which it was given will be received to explain the ambiguity;² and perhaps, in such a case, the court, without the aid of any extrinsic proof, would now in the first instance adopt that construction which would support the validity of the instrument, and would cast upon the party objecting to the guarantee the burthen of producing evidence to show that it was void.³

§ 1198. It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is, not to vary the language employed, but merely to explain the sense in which the writer understood it. Thus, a contract or other instrument, which *primâ facie* would seem to have created a joint-tenancy between two persons, may be construed as having simply established a tenancy in common, if it can be shown, not indeed by parol testimony of intention, but by evidence of the acts and dealings of the parties, and of the surrounding circumstances, that this last construction is that which the instrument was originally intended to bear.⁴ Where certain premises were leased, § 1085

¹ *Doe v. Martin*, 4 B. & Ad. 785, per Parke, J.; *Doe v. Burt*, 1 T. R. 704, per Buller, J.; *Castle v. Fox*, 11 Law Rep., Eq. 542; 40 L. J., Ch. 302, S. C.; *Webb v. Byng*, 1 Kay & J. 580; *Doe v. Ld. Jersey*, 1 B. & A. 550; S. C. in Dom. Proc., 3 B. & C. 870; *Okeden v. Clifden*, 2 Russ. 309; *Ropps v. Barker*, 4 Pick. 239; *Farrar v. Stackpole*, 6 Greenl. 154.

² *Goldshede v. Swan*, 1 Ex. R. 154, and cases there cited; *Edwards v. Jevons*, 8 Com. B. 436; *Colbourn v. Dawson*, 10 Com. B. 765; *Bainbridge v. Wade*, 16 Q. B. 89; *Hoad v. Grace*, 31 L. J., Ex. 93; 7 H. & N. 494, S. C.; *Wood v. Priestner*, 4 H. & C. 681; *Heffield v. Meadows*, 4 Law Rep., C. P. 595.

³ *Steele v. Hoe*, 14 Q. B. 431; *Brown v. Batchelor*, 1 H. & N. 255. See *Mare v. Charles*, 5 E. & B. 978; and, also, 19 & 20 V., c. 97, § 3, cited ante, § 1030.

⁴ *Harrison v. Barton*, 30 L. J., Ch. 213, per Wood, V.-C.

including a yard described by the metes and bounds, and the question was, whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show, that, at the time of the lease, the cellar was in the occupancy of another tenant, and, therefore, that it could not have been intended by the parties that it should pass by the lease.¹ So, where a testator had devised, in 1804, "all his lands in the parish of Doynton" to his daughter, and it appeared that he had a farm, which at that date was generally reputed to be wholly in Doynton, but which subsequently turned out to be partly in another parish, the Court of Exchequer rightly held that the entire farm passed under the will.² So, where a fine had been levied for twenty acres of land and twelve messuages in Chelsea, evidence was admitted to show that, though the conusor's estate at Chelsea was under twenty acres, he had nineteen houses on it; and as, read in connexion with these facts, the language of the fine was ambiguous, further proof was received as to what particular part of the property was intended to be included in it.³

§ 1199. Again, an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann. At the date of the will, Mary Beynon had two legitimate daughters, namely, Mary and Ann, and a younger illegitimate child, named Elizabeth. Thus, two persons only were in existence, who correctly answered the description in the devise; yet still Elizabeth, the illegitimate daughter, might have been included therein, had it clearly appeared that the testator so intended. In order, however, to rebut her claim, extrinsic evidence was admitted, which showed that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who was born in the order stated in the will; and that, though this daughter had died several years before the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under

§ 1085

¹ 2 Poth. Obl. 185; *Doe v. Burt*, 1 T. R. 701.

² *Austee v. Nelms*, 1 H. & N. 225.

³ *Doe v. Wilford*, 1 C. & P. 284; *Ry. & M.* 88, S. C.; *Denn v. Wilford*, 2 C. & P. 173.

these circumstances the jury were held to have rightly decided, that the illegitimate daughter Elizabeth was not entitled to the devise in question.¹

§ 1200. So, also, if an order of removal has been quashed § 1086 generally by the Sessions, the removing parish, on the trial of an appeal against a subsequent order of removal, may show by parol evidence the state of things when the first order was quashed, and that the Sessions in quashing it intended to pronounce no decision on the merits of the settlement.² For although an order of Sessions quashing an order of removal is *prima facie* evidence, that the pauper was not settled in the appellant parish,³—yet, as the decision may have proceeded, either on that ground, or on the ground that the pauper was then not chargeable, or was irremovable, and as the language of the order of Sessions is consistent with any one of these hypotheses, it must be competent for the respondents to prove the particular ground on which the decision rested.⁴

§ 1201. But although evidence of all the circumstances, which § 1087 surrounded the author of a written instrument, will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the *language* of the instrument, as explained by the extrinsic evidence; and no proof, however conclusive in its nature, can be admitted, with the view of setting up an intention inconsistent with the known meaning of the writing itself.⁵ For, the duty of the court in all these cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply,

¹ Doe v. Beynon, 12 A. & E. 431; 4 P. & D. 193, S. C.; Phillips v. Barker, 23 L. J., Ch. 44, per Stuart, V.-C.; 1 Sm. & Giff. 583, S. C.

² R. v. Wick St. Lawrence, 5 B. & Ad. 526, 537; R. v. Wheelock, 5 B. & C. 511; R. v. Perranzabuloe, 3 Q. B. 400, 402, per Patteson, J.; R. v. Flintshire, 1 New Sess. Cas. 288; 2 Dowl. & L. 143, S. C.

³ R. v. Wick St. Lawrence, 5 B. & Ad. 535, per Parke, J.; R. v. Yeoveley, 8 A. & E. 818, per Ld. Denman.

⁴ R. v. Wick St. Lawrence, 5 B. & Ad. 533, per Ld. Denman, 535, per Parke, J.

⁵ Newenham v. Smith, 10 Ir. Law R., N. S. 245, 256, 257, per Pigot, C. B. (3891)

what is the meaning of the words they have used.¹ It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument to the established rules of law.²

§ 1202. In no case therefore,—except, as will be presently pointed out,³ where the description in the document would equally apply to any one of two or more subjects,⁴ or where the object is to rebut an equity,⁵—is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer; but, in all cases alike, the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous, both with reference to the context, and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show, that in fact they used it in any other sense, or had any other intention.⁶ § 1088

§ 1203. For instance,⁷ parol evidence has repeatedly been rejected, when tendered to show what persons a testator meant to include or exclude in employing the words “relations;”⁸ what § 1089

¹ *Doe v. Gwillim*, 5 B. & Ad. 129, per Parke, J.; *Doe v. Martin*, 4 B. & Ad. 786, per id.; 1 N. & M. 524, S. C.; *Shore v. Wilson*, 9 Cl. & Fin. 525, per Coleridge, J.; 556, per Parke, B.; 566, per Tindal, C. J.; *Beaumont v. Field*, 2 Chit. R. 275, per Abbott, C. J.; *Richardson v. Watson*, 4 B. & Ad. 800, per Parke, J.; *Rickman v. Carstairs*, 5 B. & Ad. 662, 663, per Id. Denman.

² See Leiber's Legal and Polit. Hermeneutics, c. 1, § 8, and c. 3, §§ 2, 3; Doct. & Stu. 39, c. 24.

³ Post, §§ 1206, 1227.

⁴ *Shore v. Wilson*, 9 Cl. & Fin. 557, per Parke, B.

⁵ See post, §§ 1227—1230.

⁶ *Shore v. Wilson*, 9 Cl. & Fin. 525, per Coleridge, J.; 556, per Parke, B.; 565, 566, per Tindal, C. J. The case of *Re Peel*, 2 Law Rep., P. & D. 46; 39 L. J., Pr. & Mat. 36, S. C.; may be considered by some unprofessional men as a reduction of this rule to an absurdity.

⁷ For other instances, see ante, §§ 1155, 1156.

⁸ *Goodinge v. Goodinge*, 1 Ves. Sen. 230; *Edye v. Salisbury*, Amb. 70; (3892)

articles he intended to give by the word "plate,"¹ what property he thought he devised by the expression "lands out of settlement,"² and the like;³ for in all these cases, as the legal signification of the language used was plain, it mattered not in point of law what the testator intended; the sole question being, *non quod voluit, sed quod dixit*.⁴ Indeed, if this were not the rule of law no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of a particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to benefit under it, might be set up to contradict or vary the plain language of the instrument itself.⁵

§ 1203A. Though declarations of intention, except in the cases before alluded to, cannot be received in evidence to *explain* an ambiguity in a written instrument, yet, they are not always doomed to exclusion, when the question does not turn on the meaning of the language employed. For instance, if a will be lost, evidence of the testator's declarations of intention will be admissible in proof of its contents;⁶ and if the question relate to the constituent parts of an existing will, similar statements, whether oral or written, and whether made before or after it was signed, may be given in

Green v. Howard, 1 Br. C. C. 31. See Sullivan v. Sullivan, I. R., 4 Eq. 457, where the words were "my dearly beloved."

¹ Nicholls v. Osborn, 2 P. Wms. 419; Kelly v. Powlett, Amb. 605.

² Strode v. Russell, 2 Vern. 621.

³ See other instances collected in Wigr. Wills, 99—105. See, also, Doe v. Hubbard, 15 Q. B. 227; Horwood v. Griffith, 23 L. J., Ch. 465; 4 De Gex, M. & G. 700, S. C.; Hicks v. Sallitt, 23 L. J., Ch. 571; Millard v. Bailey, 1 Law Rep., Eq. 378; 35 L. J., Ch. 312, S. C., per Wood, V.-C. In Knight v. Knight, 30 L. J., Ch. 644, Stuart, V.-C., appears to have utterly ignored this rule, holding that extrinsic evidence was admissible to show that, under the words "ready money," a testator meant that shares in an insurance company should pass. Sed qu.

⁴ Shore v. Wilson, 9 Cl. & Fin. 558, 559, per Parke, B.

⁵ Id. 566, per Tindal, C. J.

⁶ Sugden v. Ld. St. Leonards, 45 L. J., P. D. & A. 45; L. R., 1 P. D. 154, S. C.

evidence to show what was or was not a part of the instrument at the time of its execution.¹

§ 1204. Moreover, the rule has been somewhat relaxed in order to facilitate the interpretation of *ancient* writings. Here, if the instrument be an old one, and its meaning doubtful, the *acts* of the author, which are only modes of expressing intention more weighty than words, may be given in evidence in aid of its construction. Thus, in the case of the Attorney-General *v.* Brazenose College,² the House of Lords held, that proof of the application of the funds of an ancient charity by the original founder, and first trustee, was strong evidence of intention, and might be so treated by the court in construing the grant. So, in the case of the Attorney-General *v.* Drummond,³ Lord Chancellor Sugden,—while acknowledging that he could not receive evidence of the declarations of the founder of an ancient charity, either against, or in favour of, his grant,—held that he was clearly entitled to inquire as to what acts the founder had done in relation to the charity; and his lordship observed, that one of the most settled rules of law for the construction of ambiguities in ancient instruments was, that the court might resort to contemporaneous usage to ascertain the meaning of the deed. “Tell me,” said he, “what you have done under such a deed, and I will tell you what that deed means.”⁴ Lord Chief Justice Tindal, also, has declared, that, for the purpose of ascertaining the sense of an old charity grant, evidence of “the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed,” was certainly admissible.⁵ § 1090

§ 1205. In each of the three examples given in the preceding § 1091

¹ Gould *v.* Lakes, 49, L. J., Pr. & Mat. 59; L. R., 6 P. D. 1, S. C.

² 2 Cl. & Fin. 295.

³ 1 Dru. & War. 353, 366, 375, 376; aff. on appeal, Drummond *v.* Att.-Gen., 2 H. of L. Cas. 837.

⁴ 1 Dru. & War. 368.

⁵ Shore *v.* Wilson, 9 Cl. & Fin. 569; Att.-Gen. *v.* Sidney Sussex Coll., 38 L. J., Ch. 657, 659, 660, per Ld. Hatherley, C.; 4 Law Rep., Ch. App. 722, 732, S. C.; Att.-Gen. *v.* May. of Bristol, 2 Jac. & W. 121, per Ld. Eldon. See 7 & 8 V., c. 45, § 2, cited ante, § 75.

section, the question turned on the construction of a charity grant; but as these instruments possess no peculiarity, which would warrant the adoption of a special rule of evidence with respect to them, it may be laid down as a general proposition, that all ancient instruments of every description may, in the event of their containing ambiguous language, but in that event alone, be interpreted by what is called contemporaneous and continuous usage under them, or in other words, by evidence of the mode in which property dealt with by them has been held and enjoyed.¹ For instance, the contemporaneous acts of occupiers of land have been admitted in evidence to explain the meaning of an ambiguous award under an old enclosure Act.² So, where the question was whether the soil, or merely the herbage, passed under the term "pastura" contained in an ancient admission as entered on the court-rolls of a manor, evidence was received to show that the tenants had for a long series of years enjoyed the land itself.³ So, the by-laws of a corporation may be taken as an exposition of their charter;⁴ and evidence of contemporaneous, or even of constant modern,⁵ usage will be admissible, for the purpose of ascertaining the meaning and effect of an ancient grant or charter from the Crown,⁶ or of any private deed, or other instrument, of remote antiquity.⁷ So, also,

¹ *Weld v. Hornby*, 7 East, 199, per Ld. Ellenborough; *Waterpark v. Fennell*, 7 H. of L. Cas. 650; *Donegall v. Templemore*, 9 Ir. Law R., N. S. 374; *D. of Devonshire v. Neill*, 2 L. R. Ir., Ex. 162—165, per Palles, C. B.; *Att.-Gen. v. Parker*, 3 Atk. 577, per Ld. Hardwicke; *R. v. Dulwich College*, 17 Q. B. 600; *Att.-Gen. v. Murdoch*, 1 De Gex, M. & G. 86. In *Att.-Gen. v. St. Cross Hospital*, 17 Beav. 435, 464, 465. Sir J. Romilly, M. R., held, that no presumption could be made against the clear ostensible purpose of the foundation, though it were supported by a usage of 150 years. See *Att.-Gen. v. Clapham*, 4 De Gex, M. & G. 591.

² *Wadley v. Baylis*, 5 Taunt. 752; recognised by Cresswell, J., in *Doe v. Bevis*, 7 Com. B. 511; *Att.-Gen. v. Boston*, 1 De Gex & Sim. 519, 527.

³ *Doe v. Bevis*, 7 Com. B. 456; *Stammers v. Dixon*, 7 East, 200.

⁴ *Davis v. Waddington*, 7 M. & Gr. 44, per Tindal, C. J.

⁵ *Chad. v. Tilsed*, 2 B. & B. 403; *Doe v. Bevis*, 7 Com. B. 456; *D. of Beaufort v. May. of Swansea*, 3 Ex. R. 413; *Master Pilots and Seamen of Newcastle v. Bradley*, 2 E. & B. 428, n.; *Shephard v. Payne*, 3 New R. 580, per Ex. Ch. on App. from C. P.; 16 Com. B., N. S. 132, S. C.

⁶ *May. of London v. Long*, 1 Camp. 22, per Ld. Ellenborough; *R. v. Varlo*, 1 Cowp. 248; *Blankley v. Winstanley*, 3 T. R. 279; *Bradley v. Pilots of Newcastle*, 2 E. & B. 427; *Jenkins v. Harvey*, 1 C. M. & R. 877; 2 C. M. & R. 393, S. C.; *Brune v. Thompson*, 4 Q. B. 543.

⁷ *Withnell v. Gartham*, 6 T. R. 397, 398, per Ld. Kenyon; *Weld v. Hornby*, 13 LAW OF EVID.—V. III. (3895)

when the language of an old statute is doubtful, the maxim, *optimus interpres rerum usus*, will be held to apply.¹

§ 1206. Besides general proof of all the facts and circumstances § 1092 respecting the persons or things to which the instrument relates, which is undoubtedly legitimate, and often necessary, evidence, in order to enable the court to understand the meaning and application of the language employed, the *declarations* of the writer of the instrument *will*, as before mentioned,² *be receivable in evidence*, in a particular class of cases; namely, *where extrinsic evidence has shown that a description in the instrument is alike applicable, with legal certainty, to two or more persons or things*.

§ 1207. The doctrine on this subject has been lucidly explained § 1093 by Lord Abinger, in an important will cause in the Exchequer.³ After stating the general rule, that the meaning of a will may be explained by evidence of all the circumstances surrounding the testator, his lordship goes on to observe,—“But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is *but one case*,⁴ in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises,

7 East, 199, per Ld. Ellenborough; Duke of Beaufort v. May, of Swansea, 3 Ex. R. 625; Sadler v. Biggs, 4 H. of Ld. Cas. 435; Waterpark v. Fennell, 7 H. of L. Cas. 650.

¹ R. v. Scott, 3 T. R. 604, per Ld. Kenyon; Sheppard v. Gosnold, Vaugh. 169; R. v. Abp. of Canterbury, 18 Q. B. 581, per Coleridge, J., 627, per Patteson, J.; Montrose Peer., 1 Macq. Sc. Cas., H. of L. 401.

² Ante, § 1202.

³ Doe v. Hiscocks, 5 M. & W. 363. See Charter v. Charter, 43 L. J., Pr. & Mat. 73, in Dom. Proc.; 7 Law Rep., H. L. 364, S. C.

⁴ As to rebutting an equity, see §§ 1227—1230.

as to which of the two or more things,¹ or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls ‘an equivocation,’ that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity;² for the intention shows what he meant to do: and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator’s intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.”³

§ 1208. In conformity with the rule thus laid down, it has been § 1094 decided, that, where a testator had devised one house “to George Gord, the son of George Gord;” another “to George Gord, the son of John Gord;” and a third, after the expiration of certain life estates, “to George Gord, the son of Gord;” evidence of his declarations was admissible to show, that the person meant to be designated by the last description was George the son of *George* Gord.⁴ So, where the devise was “to John Allen the grandson of my brother Thomas, and I charge the same with the payment of 100*l.* to each and every the brothers and sisters of the said John Allen;” and it appeared that, at the date of the will, the testator’s brother Thomas had two grandsons named John Allen, one having several brothers and sisters, and the other having one brother and one sister; the court received evidence of the declarations of the testator, to show which grandchild was intended.⁵ So, where lands

¹ See *Harman v. Gurner*, 35 Beav. 478.

² See *Douglas v. Fellows*, 1 Kay, 114, per Wood, V.-C.

³ *Doe v. Hiscocks*, 5 M. & W. 368, 369.

⁴ *Doe v. Needs*, 2 M. & W. 129; *Doe v. Morgan*, 1 C. & M. 235.

⁵ *Doe v. Allen*, 12 A. & E. 451; 4 P. & D. 220, S. C.; *Fleming v. Fleming*, 31 L. J., Ex. 419; 1 H. & C. 242, S. C.

were left to John Cluer, of Calcot, and two persons, father and son, were of that name, parol evidence of the testator's intention to leave them to the son, was held admissible.¹ So, where property was devised to "William Marshall, my second cousin," and it appeared that the testator had no second cousin of that name, but that he had two first cousins once removed, one named William Marshall, and the other named William John Robert Blandford Marshall, Vice-Chancellor Page Wood admitted parol evidence to resolve this latent ambiguity.²

§ 1209. Where declarations of intention are receivable in evi- § 1095
dence, the rule most consistent with modern authorities seems to be, that their admissibility does not depend upon the *time* when they were made. Contemporaneous declarations will certainly be entitled, *cæteris paribus*, to greater weight than those made before or after the execution; but in point of law no distinction can be drawn between them;³ unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by the instrument written by him, were simply to refer to what he intended to do, or wished to be done, at the time of speaking.⁴ Neither will the admissibility of declarations rest on the *manner* in which they were made, or on the *occasions* which called them forth; for whether they consist of statements gravely made to the parties chiefly interested, or of instructions to professional men, or of light conversations, or of angry answers to the impertinent inquiries of strangers, they will be alike received in evidence, though the credit due to them will of course vary materially according to the time and circumstances.⁵

§ 1210. Though declarations of intention are, as above stated, § 1096

¹ Jones v. Newman, 1 W. Bl. 60; explained in Doe v. Hiscocks, 5 M. & W. 370.

² Bennett v. Marshall, 2 Kay & J. 740; Re O'Reilly, 43 L. J., Pr. & Mat. 5. See Webber v. Corbett, 43 L. J., Ch. 164.

³ Doe v. Allen, 12 A. & E. 455, per Ld. Denman, as to *subsequent* declarations; Doe v. Hiscocks, 5 M. & W. 369, per Ld. Abinger, as to *previous* declarations. See, *contra*, Thomas v. Thomas, 6 T. R. 671; Strode v. Russell, 2 Vern. 625.

⁴ Whitaker v. Tatham, 7 Bing. 628.

⁵ Trimmer v. Bayne, 7 Ves. 518, per Ld. Eldon.

inadmissible, except for the purpose of explaining a latent ambiguity in the instrument, this rule will not preclude mere *collateral statements* made by the author of the instrument respecting the persons or things mentioned therein. For instance, to take the case of a will, the testator may have habitually called certain persons or things by *peculiar names*, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.¹ Thus, in *Blundell v. Gladstone*,² where the question was, whether the second son of *Joseph Weld*, of Lulworth, was the party beneficially entitled under a devise in trust for "the second son of *Edmond Weld*, of Lulworth, Esq.," parol evidence was admitted to show that the testator had on several occasions, even after correction, called the possessor of Lulworth "Edmond."

§ 1211. The case of *Lee v. Pain*³ affords a good illustration of this doctrine. There, a testatrix, by a codicil dated in 1836, had bequeathed "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden, 200*l.* each." These legacies were claimed by a Mrs. Washbourne and her daughter. It appeared in evidence, that Mrs. Washbourne was the daughter of the Rev. J. Bowden, who died in 1812, and the widow of the Rev. D. Washbourne, a dissenting minister at Hammersmith. Mrs. Bowden died in 1820, since which time no person had lived at Hammersmith answering the description in the codicil. It further appeared that the testatrix, who was of great age, had been intimately acquainted with the Bowdens and the Washbournes; that she had been in the habit of calling Mrs. Washbourne by her maiden name of Bowden; and that being often reminded of the mistake, she had always acknowledged that she had confounded the

¹ *Doe v. Hiscocks*, 5 M. & W. 368, per Ld. Abinger. See, also, *Doe v. Hubbard*, 15 Q. B. 227, 237, per Erle, J.

² 11 Sim. 467, 470; 1 Phill. 284, 285, S. C. See, also, *Mostyn v. Mostyn*, 3 De Gex, M. & G. 140, aff. in Dom. Proc., 23 L. J., Ch. 925; 5 H. of L. Cas. 155, S. C.

³ 4 Hare, 251—253. See, also, *R. v. Wooldale*, 6 Q. B. 549.

two names. Under these circumstances, Vice-Chancellor Wigram decided that the claimants were entitled to their respective legacies. So, where a bequest was made to "Mrs. G.," parol evidence was admitted to show that the testator had been in the habit of calling a Mrs. Gregg, Mrs. G."¹ The case of *Beaumont v. Fell*² carries this doctrine to its extreme limit. There, a legacy, given to Catherine Earnley, was claimed by Gertrude Yardley; and it appearing that no such person was known as Catherine Earnley, proof was received that the testator usually called the claimant Gatty, which might easily have been mistaken by the scrivener who drew the will for Katy, and the court, acting on this, and on other evidence of a like nature, was perhaps justified in deciding in favour of the claimant.

§ 1212. This rule, which governs the admissibility of declarations of intention, will be better understood by referring to a few cases, where evidence of such declarations has been rejected; and these cases will be cited the more readily, because they illustrate a distinction, which has been recognised since the days of Lord Bacon, as subsisting between *latent* and *patent* ambiguities. The leading doctrine on this subject is thus given by that great philosophical lawyer:—"Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur."³ Upon which he remarks, that "There be two sorts of ambiguities of words, the one is ambiguitas patens, and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. Ambiguitas patens is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of

¹ *Abbott v. Massie*, 3 Ves. 148, explained by Rolfe, B., in *Clayton v. Ld. Nugent*, 13 M. & W. 204, 207. See, also, in the goods of François de Rosaz, 46 L. J., Pr. & Mat. 6; L. R., 2 P. D. 66, S. C.

² 2 P. Wms. 141. In this case declarations of the testator were admitted, but the propriety of receiving such evidence has been strongly questioned by Ld. Abinger in *Doe v. Hiscocks*, 5 M. & W. 371, and the case, as an authority on that point, may be considered overruled.

³ Bacon's Maxims, Reg. 23.

averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. et hæredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be ambiguitas latens, then otherwise it is; as if I grant my manor of S. to J. F., and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was, that the party intended should pass."¹

§ 1213. The above quotation from Lord Bacon's works has been cited, more out of respect to that great man, than in the expectation that it will afford much practical information. So far as patent ambiguities are concerned, Lord Bacon expounds the law with sufficient precision; for no doubt can be entertained that when the ambiguity is *patent*, all declarations of the writer's intention will be uniformly excluded. If, therefore, a testator, after leaving specific legacies to his several children, were to bequeath the residue to his child, not specifying which, the will, so far as regarded the residuary bequest, would be inoperative and void. So, where Sir Gilbert East indulged the strange caprice of leaving his property to persons whom he designated by the letters of the alphabet, stating at the end of his will that the key to the initials was in his writing-desk on a card: the intended objects of his bounty were defeated by his next of kin, no card being found of as old date as the will. A card, indeed, was discovered, which would have furnished a key had it been admissible; but as it was dated many years after the execution of the will, it could only be regarded as a declaration of the testator; and, the case being one of patent ambiguity, the court held, in conformity with all the authorities on the subject, that this species of evidence could not be legally admitted.²

¹ See Bacon's Law Tracts, 99, 100.

² Clayton v. Ld. Nugent, 13 M. & W. 200. See Kell v. Charmer, 23 Beav. 195, cited ante, § 1196; and see, also, Whateley v. Spooner, 3 Kay & J. 542, cited ante, § 1195.

§ 1214. But the cases go much further than this; and it is especially necessary to guard against the supposition, that, because no ambiguity arises on the face of the instrument, any doubt which is occasioned by the introduction of extrinsic evidence, may be cleared up by having recourse to the declarations of the writer's intention. This is not the law; and many instances of strictly *latent* ambiguities might be given, where evidence of declarations of intention would be inadmissible. For, in the first place, a will, apparently plain and intelligible, may, when an inquiry is instituted respecting the persons or things to which it relates, turn out to be uncertain; that is, the persons or things may prove not to have been described with *legal certainty*. Suppose a bequest be made to the *four* children of A., and it appears that A. had *six* children, two by a first marriage, and the remainder by a second. Here, though evidence of the circumstances of the family, and of the respective ages of the children, would no doubt be admissible, with the view of identifying the particular legatees alluded to in the will, it seems that proof of the testator's declarations of intention could not be received.¹ § 1100

§ 1215. Secondly, a legatee may be so described in a will, that *while part of the description answers to one claimant, the remainder may apply to another*. The voice is Jacob's voice, but the hands are the hands of Esau. Here the law, with questionable policy, used to attach somewhat greater weight to the *name* than to the *description* of the legatee; and, therefore, if there were nothing in the rest of the will, or in the evidence received, to show who was meant, the person rightly named was allowed to take in preference to him who was only rightly described.² This doctrine, however, —which seems to have been first promulgated by Lord Bacon,³ and which is embodied by him in the Latin maxim, "*Veritas nominis*" § 1101

¹ Doe v. Hiscocks, 5 M. & W. 371, per Ld. Abinger, questioning Hampshire v. Peirce, 2 Ves. Sen. 216.

² Ld. Camoys v. Blundell, 1 H. of L. Cas. 786, per Parke, B., pronouncing the opinion of the judges. But see Drake v. Drake, 25 Beav. 642; 29 L. J., Ch. 850, S. C. in Dom. Proc.; 8 H. of L. Cas. 172, S. C.; and Farrer v. St. Catherine's Coll., 16 Law Rep., Eq. 21, per Ld. Selborne, C.; 42 L. J., Ch. 809, S. C.

³ Lord Camoys v. Blundell, 1 H. of L. Cas. 792, per Ld. Brougham.

tollit errorem demonstrationis,"—has been very roughly handled by Lord Chancellor Campbell in the House of Lords;¹ and if, on the one hand, it cannot at present be safely regarded as an exploded maxim,² still less, on the other hand, can it be recognised as an inflexible rule.³ The court, in all such cases, will look narrowly at the context and the surrounding facts, and place itself, as nearly as may be, in the situation of the testator at the time of executing the instrument; and if it can then *clearly* ascertain from the language of the will thus illustrated,⁴ which of the two claimants was intended by the testator, it will award the legacy to the one so meant to be benefited,⁵ though the supposed maxim may in such case chance to be contravened.⁶

§ 1216. The case of *Ryall v. Hannam*⁷ affords a striking illustration of this last rule. There, a testator devised an estate to his nephew for life, with remainder over to "*Elizabeth Abbott, a natural daughter* of Elizabeth Abbott, of Gillingham, single woman, who had formerly lived in his service." It appeared that, at the

¹ *Drake v. Drake*, 8 H. of L. Cas. 172, 179.

² See *In re Plunkett's estate*, 11 Ir. Eq. R., N. S. 361; *Colclough v. Smyth*, 14 Ir. Eq. R., N. S. 127; and 15 *id.* 353; *Garner v. Garner*, 29 Beav. 116; *Gillett v. Gane*, 10 Law Rep., Eq. 29; 39 L. J., Ch. 818, S. C.

³ *Ld. Camoys v. Blundell*, 1 H. of L. Cas. 778, 786, 792; *Thomson v. Hempenstall*, 7 Ec. & Mar. Cas. 141, per Dr. Lushington; 1 Roberts. 783, S. C.

⁴ *Re Blake*, L. R., 6 P. D. 217.

⁵ *Re Garland*, 47 L. J., Ch. 711, per Fry, J.; L. R., 9 Ch. D. 213, S. C. nom. *Garland v. Beverley*; *In re Lyon's Trusts*, 48 L. J., Ch. 245, per Hall, V.-C.

⁶ *Doe v. Huthwaite*, 3 B. & A. 632, explained by *Ld. Abinger* in *Doe v. Hiscocks*, 5 M. & W. 369, 372; *Blundell v. Gladstone*, 11 Sim. 467, 485—488; 1 Phill. 279, 282, 283, S. C.; 1 H. of L. Cas. 778, nom. *Ld. Camoys v. Blundell*; *Healy v. Healy*, 1 R., 9 Eq. 418; *Charter v. Charter*, 43 L. J., Pr. & Mat. 73, in Dom. Proc.; 7 Law Rep., H. L. 364, S. C.; *In re Wolverton Mortgaged Estates*, L. R., 7 Ch. D. 197, per Malins, V.-C.; 47 L. J., Ch. 127, S. C.; *In re Nunn's Will*, 44 L. J., Ch. 255; 19 Law Rep., Eq. 331, S. C.; *In re Blayney's Trusts*, 1 R., 9 Eq. 413, where the doctrine was certainly carried to its extreme limit by *Sullivan, M. R.*; *Bernasconi v. Atkinson*, 10 Hare, 345; *In re Bridget Feltham*, 1 Kay & J., 528; *Hodgson v. Clarke*, 1 De Gex, F. & J. 394, reversing S. C. in 1 Giff. 139; *Re Gregory's Settlt. & Wills*, 34 Beav. 600; *Re Noble's Trusts*, 1 R., 5 Eq. 140; *Re Feltham's Trusts*, 1 Kay & J. 528; *Re Kilvert's Trusts*, 7 Law Rep., Ch. App. 170; 41 L. J., Ch. 351, S. C.; reversing S. C. in 12 Law Rep., Eq. 183, per Malins, V.-C.; *Dooley v. Mahon*, 1 R., 11 Eq. 299.

⁷ 10 Beav. 536. See, also, *Douglas v. Fellows*, 1 Kay, 114.

date of the will in 1798, Elizabeth Abbott, the mother, was the wife of John Caddy, and had had two children only, both of whom were then living. One was a *natural son* named John, who was born in 1791, before his mother's marriage, and shortly after she had left the testator's service, and of whom the testator's nephew was the putative father; the other, born in 1795, was a *legitimate daughter* by John Caddy, named Margaret. It further appeared that the testator had wished his nephew to marry his servant, that he was aware she had had a natural child, and that he had treated her kindly since its birth and up to the date of the will; but no proof was given that he knew whether the natural child was a boy or a girl. The claimants of the estate were the son of John, the daughter Margaret, and the heir at law. Under these circumstances, Lord Langdale, after much doubt, came to the conclusion, that the testator meant to provide for his nephew's natural child by Elizabeth Abbott, his servant, and that the mistake of the name and sex was not sufficient to defeat the devise. In another case,¹ a man, during the lifetime of his wife, Mary, had married a second wife, Caroline, with whom he continued to reside up to the date of his decease. Shortly before his death he devised certain property to "his dear wife Caroline," and the question was, which of the two ladies, for both survived him, was designated by the will: the lawful wife who was wrongly, or the unlawful wife who was rightly, named. The court without hesitation held that Caroline was entitled to take under the devise.

§ 1217. It must, however, be remembered, that in cases of this nature, the court,—fettered by a rule which would be regarded as absurd in the ordinary affairs of life,—cannot receive any declarations of the testator as to what he intended to do in making his will. This was the precise point determined in the leading case of *Doe v. Hiscocks*.² There, a testator devised lands to his son, John Hiscocks, § 1103

¹ *Doe v. Rouse*, 5 Com. B. 422; *Adams v. Jones*, 21 L. J., Ch. 352, per Turner, V.-C.; 9 Hare, 486, S. C.; *Dilley v. Matthews*, 2 New R. 60, per Wood, V.-C.

² 5 M. & W. 363, 371, where Ld. Abinger questions and overrules the contrary dicta of Ld. Kenyon and Lawrence, J., in *Thomas v. Thomas*, 6 T. R. 677, 678.

for life; and after his decease, to his grandson, "*John, the eldest son of the said John Hiscocks.*" In fact, the testator's son had been twice married; by his first wife he had Simon, but John was the eldest son of the second marriage. Under these circumstances the court held that evidence of the instructions given by the testator for his will, and of his declarations, was inadmissible for the purpose of showing which of these two grandsons was intended by the language employed.¹

§ 1218. Thirdly, the description, though applicable in no respect § 1104 to more than one person or thing shown to have been in existence at the time when the instrument in question was executed or made, may *not accurately specify* even one person or thing; that is, the description of the subject intended may be true in part, but not true in every particular. Here, though parol evidence of the author's declaration cannot be received, the instrument will not in consequence of the inaccuracy be regarded as inoperative; but if, after rejecting so much of the description as is false, the remainder will enable the court to ascertain with legal certainty the subject-matter to which the instrument really applies, it will be allowed to take effect.² The rule in such cases is derived from the civil law:—*Falsa demonstratio non nocet, cum de corpore constat.* Thus, for example, where a testator had left a legacy to his "niece Elizabeth Stringer," and it was proved that at the date of the will no niece of that name was living, a great-great niece of the testator, who, of course, could not be described as his niece with any regard to precision of language, and whose name was not simply Elizabeth, but Elizabeth Jane Stringer, was held entitled to the bequest.³

§ 1219. This case is further remarkable as showing with what un- § 1104 wise strictness the rule is enforced, which excludes parol evidence of a testator's declarations and intentions. The executors who opposed the claim of the great-great niece, did so on what,—apart from

¹ See, also, *Drake v. Drake*, 8 H. of L. Cas. 172; *Douglas v. Fellows*, 1 Kay, 114; *Bernasconi v. Atkinson*, 10 Hare, 345; *Farrer v. St. Catherine's Coll.* 16 Law Rep., Eq. 21, per Ld. Selborne, C.; 42 L. J., Ch. 809, S. C.

² See *Ford v. Batley*, 23 L. J., Ch. 225; *Coltman v. Gregory*, 40 L. J., Ch. 352.

³ *Stringer v. Gardiner*, 27 Beav. 35; 4 De Gex & J. 468, S. C.

legal technicalities,—would be regarded as very strong grounds; for they were prepared, had the court permitted them, to prove the following facts. The testator had had a niece named Elizabeth Stringer, to whom by a former will he had left a legacy. This niece, who was grandmother of the claimant, died in 1848; and in 1850, the testator made a codicil which, without alluding to the lapsed legacy, revoked a devise to his grandson. In 1852, he instructed his solicitor to prepare a second codicil with the view of restoring his grandson to favour, and of making some slight alterations in the disposition of his property; but on this occasion also no reference was made to Elizabeth Stringer's legacy. The solicitor recommended that, in lieu of two inconsistent codicils, a new will should be made; and being himself ignorant of the death of the niece, he copied into the second will the bequest in her favour as it stood in the first will. The draft thus framed was duly executed; and as the testator's memory was impaired by age, and his attention moreover was not in any way directed to the legacy in question, no reasonable doubt could be entertained but that, as it had been inserted by the solicitor through ignorance, it was allowed to remain by the testator through forgetfulness. In other words, assuming the evidence to be admissible, the claimant was *clearly* not the object of the testator's bounty. The evidence, however, was rejected, first, by the Master of the Rolls,¹ and next, by the full Court of Appeal,² and the legacy was consequently awarded to the claimant.

§ 1220. Returning now to the rule, which rejects erroneous descriptions, provided they be not substantially important, it should be borne in mind, as an essential element in the case, that enough must remain to show plainly the intent. “The rule,” said Mr. Justice Parke,³ “is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former.” It matters not which part of the description is placed first, and which last, in

¹ Stringer v. Gardiner, 27 Beav. 35.

² Id., 4 De Gex & J. 468.

³ Doe v. Galloway, 5 B. & Ad. 43, 51. See, also, Doe v. Hubbard, 15 Q. B. 227; Doe v. Carpenter, 16 Q.B. 181.

the sentence; since "it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives vitam et modum to the sentence."¹

§ 1221.² Therefore, under a lease of "all that part of Blenheim park, situate in the county of Oxford, and now in the occupation of one S., lying" within certain specified abutments, "with all the houses thereto belonging, and which are now in the occupation of the said S." a house lying within the abutments, though not in the occupation of S., was held to pass.³ So, by a devise of "all that my farm called Trogue's farm, now in the occupation of C.," the whole farm passed, though it was not all in C.'s occupation.⁴ So, also, a devise of all the testator's *freehold* houses in Aldersgate-street, when in fact he had only leasehold houses there, has been held in substance and effect to be a devise of his houses in that street, and the word *freehold* has been rejected as surplusage.⁵ So, if a landlord, having but one house in a street, were to describe it in a lease by a wrong number, and then let a tenant into possession under it, he could not afterwards rely on the error, and contend that no interest had passed; for the number would be rejected as an immaterial part of the description.⁶ And so, where land was described in a patent as lying in the county of M., and further described by reference to natural monuments; and it appeared that the land described by the monuments was in the county of H.,

¹ *Stukeley v. Butler*, Hob. 171.

² Gr. Ev. § 301, in part.

³ *Doe v. Galloway*, 5 B. & Ad. 43; *Dyne v. Nutley*, 14 Com. B. 122.

⁴ *Goodtitle v. Southern*, 1 M. & Sel. 299, recognised as law in *Miller v. Travers*, 8 Bing. 253; and in *Slingsby v. Grainger*, 7 H. of L. Cas. 282, per Ld. Cranworth. See, also, *Hardwick v. Hardwick*, 16 Law Rep., Eq. 168, per Ld. Selborne, C.; 42 L. J., Ch. 636, S. C.; *Barber v. Wood*, L. R., 4 Ch. D. 885, per Hall, V.-C.; 46 L. J., Ch. 728, S. C.; *Norreys v. Franks*, I. R., 9 Eq. 18; *Keogh v. Keogh*, I. R., 8 Eq. 179; S. C. on app. id. 449; *Harrison v. Hyde*, 4 H. & N. 805; *Stanley v. Stanley*, 2 Johns. & Hem. 491; *West v. Lawday*, 11 H. of L. Cas. 375; *White v. Birch*, 36 L. J., Ch. 174, per Malins, V.-C.; In re *Whatman*, 34 L. J., Pr. & Mat. 17; *Travers v. Blundell*, L. R., 6 Ch. D. 436, per Ct. of App.

⁵ *Day v. Trig*, 1 P. Wms., 286, cited with approbation by Tindal, C. J., in *Miller v. Travers*, 8 Bing. 253; *Doe v. Cranstoun*, 7 M. & W. 1, 10, 11, per Parke, B.

⁶ *Hutchins v. Scott*, 2 M. & W. 816, per Ld. Abinger. See *Hitchin v. Groom*, 5 Com. B. 515.

and not of M.; that part of the description which related to the county was rejected. The entire description in the patent, said the court, must be taken, and the identity of the land ascertained, by a reasonable construction of the language used. If there be a repugnant description, which, by the other descriptions in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void.¹ Again, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description, and not to the other, the description of the lands, which he owned, will be taken to be the true one, and the other will be rejected as *falsa demonstratio*.²

§ 1222. The rule which rejects erroneous description, and admits parol evidence for the purpose of showing how the mistake arose, was carried to its extreme bounds in the cases of *Selwood v. Mildmay*,³ and *Lindgren v. Lindgren*.⁴ In the former of these cases, a testator had devised to certain legatees 1250*l.*, which he described as "part of his stock in the 4 per cent. annuities of the Bank of England." At the date of the will, and thence up to the time of his death, the testator had no such stock, but he had had some money in the 4 per cents. some years before, and had sold it out, and invested the produce in Long Annuities. Proof of these facts being tendered, the Master of the Rolls admitted the evidence, not, indeed, "to prove that there was a mistake, for that was clear, but to show how it arose;" and his Honour then held, that, as the testator obviously meant to give the legacies, but mistook the fund, the only effect of the mistake as explained by the evidence was, that the legacies ceased to be specific, and must consequently be paid

¹ *Boardman v. Reed & Ford's Lessees*, 6 Pet. 328, 345, per McLean, J.

² *Loomis v. Jackson*, 19 Johns. 449; *Lush v. Druse*, 4 Wend. 313; *Jackson v. Marsh*, 6 Cowen, 281; *Worthington v. Hylyer*, 4 Mass. 196; *Elague v. Gold*, Cro. Car. 447; *Swift v. Eyres*, id. 548. The object in cases of this kind is, to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is, to give most effect to those things about which men are least liable to mistake. *Davis v. Rainsford*, 17 Mass. 210; *McIver v. Walker*, 9 Cranch, 178.

³ 3 Ves. 306.

⁴ 9 Beav. 358.

out of the general personal estate. The circumstances in *Lindgren v. Lindgren* were nearly identical with those in *Selwood v. Mildmay*, and Lord Langdale's judgment proceeded on the same ground as those on which the former decision was founded. "It is very necessary to observe," said his lordship, "that in the case of *Selwood v. Mildmay*, the evidence was received only for the purpose stated by the Master of the Rolls in his judgment," that is, in order to show how the mistake arose, "and not, as it has been erroneously supposed,¹ for the purpose of showing that the testator, when he used the erroneous description of the 4 per cent. stock, meant to bequeath the Long Annuities, which he had purchased with the produce of the 4 per cent. stock; and that the result of the case was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeath;—not to substitute the Long Annuities, which the testator had, and did not purport to give, for the 4 per cent. Bank Annuities which he had not, and did purport to give;" but simply to render legacies, which were *prima facie* specific, payable out of the general personal estate.²

§ 1223. In connexion with this subject, notice may be taken of a somewhat arbitrary rule of equitable construction, which prevails in the courts with reference to the interpretation of wills. The rule is, that if legacies be given to any specified number of children, as, for instance, 500*l.* apiece to the *three* children of A., and it turn out that at the date of the will A. had any larger number of children, the court will reject the number mentioned in the will, upon the presumption of mistake, and will award a legacy of 500*l.* to each of A.'s children.³ § 1107

¹ In *Miller v. Travers*, 8 Bing. 252, 253; and *Doe v. Hiscocks*, 5 M. & W. 370.

² 9 Beav. 363. See, also, *Quennell v. Turner*, 13 Beav. 240; *Tann v. Tann*, 2 New R. 412, per Romilly, M. R.; and *Hunt v. Tulk*, 2 De Gex, M. & G. 300, in which last case the Lords Justices, in order to set right what appeared to them to be an obvious clerical error, held that the words, "fourth schedule," in a will, should be read as if they were "fifth schedule."

³ *Daniell v. Daniell*, 4 De Gex & Sm. 337; *McKechnie v. Vaughan*, 15 Law Rep., Eq. 289, per James, L. J.; *Morrison v. Martin*, 5 Hare, 507; *Lee v. Pain*, 4 Hare, 249, 250; *Scott v. Fenoulhett*, 1 Cox, Ch. R. 79; *Yeats v. Yeats*, 16 Beav. 170. See *Wrightson v. Calvert*, 1 Johns. & Hem. 250; *Newman v. Piercey*, L. R., 4 Ch. D. 41; 46 L. J., Ch. 36, S. C.

§ 1224. Although false statements, which have been introduced into an instrument by way of affirmation only, may be rejected, provided the remaining description be sufficient to identify the person or thing intended, they cannot be disregarded, if they have been used by way of *exception* or *limitation*; because, in this latter case, it is obvious that they were intended to have a *material* operation.¹ Moreover, the reader must not lose sight of another acknowledged rule of construction, that if there be one subject-matter, wherein all the demonstrations in a written instrument are true, and another wherein part are true and part false, the words of such instrument shall be intended words of true limitation to pass only that subject-matter wherein all the circumstances are true.² Such is the correct meaning of the maxim enunciated by Lord Bacon, “Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram.”³ Thus, where a devise was of “all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk;” and it appeared that the testator had bought of the Duke four houses very near Snig Hill, and two at some considerable distance from it, and in a place bearing a different name; the court held that the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land tax upon all by one contract.⁴ So, under a bill of sale assigning “all the household goods of every description at No. 2, Meadow Place, more particularly set forth in an inventory of even date herewith,” no goods will pass except those specified in the inventory.⁵

¹ Taylor v. Parry, 1 M. & Gr. 623, per Maule, J.

² Doe v. Bower, 3 B. & Ad. 459, 460, per Parke, J.; Ex parte Kirk, In re Bennett, L. R., 5 Ch. D. 800, per Ct. of App. overruling S. C., nom. Ex parte Close, In re Bennett & Glave, 46 L. J., Bk. 3.

³ Morrell v. Fisher, 4 Ex. R., 604, per Alderson, B. See, also, Boyle v. Mulholland, 10 Ir. Law R., N. S. 150; Horner v. Horner, 46 L. J., Ch. 617, 620, per Fry, J.

⁴ Doe v. Bower, 3 B. & Ad. 453; Homer v. Homer, 47 L. J., Ch. 635, 640, per Ct. of App.; L. R., 8 Ch. D. 758, 775, S. C.; Pogson v. Thomas, 6 Bing. N. C. 337; Doe v. Ashley, 10 Q. B. 663; Webber v. Stanley, 16 Com. B., N. S. 698; 33 L. J., C. P. 217, S. C.; Smith and Goddard v. Ridgway, 2 H. & C. 37; S. C. in Ex. Ch., 4 H. & C. 577; Pedley v. Dodds, 2 Law Rep., Eq. 819.

⁵ Wood v. Rowcliffe, 6 Ex. R. 407; Morrell v. Fisher, 4 Ex. R. 591; Barton v. Dawes, 10 Com. B. 261.

§ 1225. Where a testator devised to A. his *freehold* messuage, farms, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a pepper-corn rent, the court held that as the devise correctly described the freehold, the leasehold part was not included therein, though it was proved that this part was interspersed with, and undistinguishable from, the freehold, and that the whole farm had always been treated as freehold by the testator.¹ It seems that this last rule will be enforced with greater strictness, where an interpretation is to be put upon a devise of real estate, than in other cases; for it is an established doctrine of construction, that an heir at-law shall not be disinherited except by express words.² § 1108

§ 1226. From the preceding cases and observations the following rules may be collected. First, where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author.³ Secondly, if the description of the person or thing be *partly applicable* and *partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible.⁴ Thirdly, if the description be partly correct and partly incorrect, and the correct part be sufficient of itself to enable the court to identify the subject intended, while the incorrect part is *inapplicable to any subject*, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement.⁵ Fourthly, if the description be *wholly inapplicable* to the subject intended, or said § 1109

¹ *Stone v. Greening*, 13 Sim. 390; *Hall v. Fisher*, 1 Coll. 47; *Quennell v. Turner*, 13 Beav. 240; *Evans v. Angell*, 26 Beav. 202. See, also, *Gilliat v. Gilliat*, 28 Beav. 481; *Mathews v. Mathews*, 4 Law. Rep., Eq. 278.

² *Doe v. Bower*, 2 B. & Ad. 459, per Parke, J.

³ *Wigr. Wills*, 160.

⁴ *Doe v. Hiscocks*, 5 M. & W. 33.

⁵ *Wigr. Wills*, 67—70.

to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe.¹ Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author ment to use them, the instrument may have a full effect.²

§ 1227.³ It remains only to notice a class of cases in which parol § 1110 declarations of intention, in common with other extrinsic evidence, are allowed to affect the operation of a writing, though the writing on its face is free from ambiguity. The class alluded to embraces all those cases in which evidence is offered to *rebut an equity*.⁴ The meaning of this is, that, where the principles of Equity raise a presumption against the apparent intention of a written instrument, such presumption may be repelled by extrinsic evidence, whether of declarations, or of collateral facts, showing the intention to be otherwise.⁵ The simplest instance of this occurs, when two legacies, left to the same person by different testamentary instruments, are, contrary to the general rule,⁶ presumed not to have been intended as cumulative, on the ground that the sums and the expressed motives of both exactly correspond.⁷ Here, to rebut the presumption, which makes one of these legacies inoperative, parol evidence of every kind will be received; its effect being, not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed.⁸ In like manner, extrinsic evidence is

¹ Wigr. Wills, 133.

² Doe v. Hiscocks, 5 M. & W. 369, 370, per Ld. Abinger; Wigr. Wills, 11, cited ante, § 1131, n. 4.

³ Gr. Ev. § 296, in part.

⁴ See Bulkley v. Littlebury, 2 Vern. 621; 3 Br. P. C. 43, S. C.; Francis v. Dichfield, 2 Coop. 532.

⁵ Hall v. Hill, 1 Dru. & War. 113, 114, per Sugden, C.; Hurst v. Beach, 5 Madd. 351; Trimmer v. Bayne, 7 Ves. 518, per Ld. Eldon.

⁶ See Russell v. Dickson, 4 H. of L. Cas. 293; Brennan v. Moran, 6 Ir. Eq. R., N. S. 126; Wilson v. O'Leary, 12 Law Rep., Eq. 525, per Bacon, V.-C.; 40 L. J., Ch. 709, S. C.; aff. by Lds. Js., 41 L. J., Ch. 342; 7 Law Rep., Ch. Ap. 448, S. C.; Hubbard v. Alexander, L. R., 3 Ch. D. 738; 45 L. J., Ch. 740, S. C.

⁷ Tatham v. Drummond, 33 L. J., Ch. 438, per Wood, V.-C.; Tuckey v. Henderson, 22 Beav. 174.

⁸ Hurst v. Beach, 5 Madd. 351, 359, 360, per Leach, V.-C.; recognised in Hall v. Hill, 1 Dru. & War. 116, 127, by Sugden, C.; and in Tussaud v.

admissible to repel the presumption against double portions,¹ which the courts raise, when a father makes a provision for his daughter by settlement on her marriage, and afterwards provides for her by his will.² So, also, to repel the presumption, that the portionment³ of a legatee by a parent or person in loco parentis,⁴ was intended to operate as an ademption, though only pro tanto,⁵ of the legacy.⁶

§ 1228. Again, the courts, — after establishing the somewhat § 1110 forced presumption, that a debt due from a testator is intended to be satisfied by a legacy of a greater or equal amount bequeathed by him to his creditor,⁷ — have been so little satisfied with the law thus

Tussaud, 47 L. J., Ch. 849, per Ct. of App.; S. C. nom. *Re Tussaud's Estate*, L. R., 9 Ch. D. 363.

¹ See *Montague v. Montague*, 15 Beav. 565, *In re Lawes*, L. R., 20 Ch. D. 81. This presumption is not recognised in Scotland, *Kippen v. Darley*, 3 Macq. Sc. Cas. H. of L. 203.

² *Weall v. Rice*, 2 Russ. & Myl. 251, 267; *Ld. Glengall v. Barnard*, 1 Keen, 769, 793; *Hall v. Hill*, 1 Dru. & War. 124—131, per Sugden, C., explaining and limiting the two former cases. See *Lady E. Thynne v. Ld. Glengall*, 2 H. of L. Cas. 153—155; *Ld. Jn. Chichester v. Coventry*, 36 L. J., Ch. 673, per Dom. Proc.; 2 Law Rep., H. L. 71, S. C.; *Tussaud v. Tussaud*, 47 L. J., Ch. 849, per Ct. of App.; S. C. nom. *Re Tussaud's Estate*, L. R., 9 Ch. D. 363; *Nevin v. Drysdale*, 4 Law Rep., Eq. 517, per Wood, V.-C.; 33 L. J., Ch. 662, S. C.; *Dawson v. Dawson*, 4 Law Rep., Eq. 504, per id.; *Russell v. St. Aubyn*, L. R., 2 Ch. D. 398; 46 L. J., Ch. 641, S. C.; *Bennett v. Houldsworth*, 46 L. J., Ch. 646, per id.; *Edgeworth v. Johnston*, I. R., 11 Eq. 326; *Curtis v. Mackenzie*, W. N., No. 45 of 1877, Ch. D. 213, per Jessel, M. R.

³ This need not be by deed, or in consideration of marriage, *Leighton v. Leighton*, 43 L. J., Ch. 594, per Hall, V.-C.; 18 Law Rep., Eq. 458, S. C.

⁴ See *Benham v. Newell*, 24 L. J., Ch. 424, per Romilly, M. R.; S. C. nom. *Palmer v. Newell*, 20 Beav. 32; 8 De Gex, M. & G. 74, S. C.; *Campbell v. Campbell*, 35 L. J., Ch. 241, per Wood, V.-C.; 1 Law Rep., Eq. 383, S. C.

⁵ *Pym v. Lockyer*, 5 Myl. & Cr. 29, per Ld. Cottenham; recognised in *Suisse v. Lowther*, 2 Hare, 434, per Wigram, V.-C. See *Montefiore v. Guedalla*, 29 L. J., Ch. 65; 1 De Gex, F. & J. 93, S. C.; *Fowkes v. Pascoe*, 44 L. J., Ch. 367, per Lds. Js.; 10 Law Rep., Ch. App. 343, S. C.; *Ravenscroft v. Jones*, 33 L. J., Ch. 482; 32 Beav. 669, S. C.; *Watson v. Watson*, 33 Beav. 574; *In re Peacock's Estate*, 14 Law Rep., Eq. 236.

⁶ *Trimmer v. Bayne*, 7 Ves. 515, per Ld. Eldon; *Hall v. Hill*, 1 Dru. & War. 120; *Cooper v. Macdonald*, 42 L. J., Ch. 533, 538, per Ld. Selborne, C.; 16 Law Rep., Eq. 258, S. C.; *Curtin v. Evans*, I. R., 9 Eq. 553; *Kirk v. Eddowes*, 3 Hare, 517, per Wigram, V.-C.; *Hopwood v. Hopwood*, 26 L. J., Ch. 292; 22 Beav. 488, S. C.; 29 L. J., Ch. 747, S. C. in Dom. Proc.; 7 H. of L. Cas. 728, S. C.; *Schofield v. Heap*, 28 L. J., Ch. 104; *Beckton v. Barton*, 27 Beav. 99; *Phillips v. Phillips*, 34 Beav. 19. See ante, § 1146.

⁷ *Brown v. Dawson*, Prec. in Ch. 240; *Fowler v. Fowler*, 3 P. Wms. 353; *Atkinson v. Littlewood*, 18 Law Rep., Eq. 595.

made, that for a long period they have eagerly caught at any trifling circumstance, whether arising out of the language of the will,¹ or brought under their notice by extrinsic evidence,² in order to afford them an excuse for evading a rule of such questionable policy.³ Another illustration is furnished by the doctrine of resulting trusts, where a man purchases property in the name of a stranger. Here, as before observed,⁴ the law raises a presumption in favour of the person who paid the purchase money; but still the stranger may give parol evidence to support his title, and show that the purchase was intended for his benefit, that is, he may rebut the presumption, and support the instrument.⁵

§ 1229. In all these cases, when parol evidence has been *first* § 1111 admitted to show that the presumption drawn by the law is not in accordance with the real intention of the author of the instrument, counter evidence will likewise be received to *fortify* the presumption; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill founded.⁶ But here it must be carefully noted, that, in the absence of evidence to countervail the presumption, no parol evidence in support of it can be adduced; for, in the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument.⁷ If, then, the circumstances on the face of the instrument are such as to rebut the presumption drawn by the law, or if the court does not raise any presumption at all, parol evidence to fortify the presumption in the one case, or to create it in the other, will be alike inadmissible; because, in either

¹ *Rowe v. Rowe*, 2 De Gex & Sm. 297; *Matthews v. Matthews*, 2 Ves. Sen. 636; *Bartlett v. Gillard*, 3 Russ. 156.

² *Wallace v. Pomfret*, 11 Ves. 547.

³ See *Edmunds v. Low*, 3 Kay & J. 318.

⁴ *Ante*, § 1017.

⁵ *Hall v. Hill*, 1 Dru. & War. 114, per Sugden, C. See, also, *Sidmouth v. Sidmouth*, 2 Beav. 447; *Williams v. Williams*, 32 Beav. 370; *Nicholson v. Mulligan*, 1 R., 3 Eq. 308.

⁶ *Kirk v. Eddowes*, 3 Hare, 517, 520; *Hall v. Hill*, 1 Dru. & War. 121; *Ferris v. Goodburn*, 27 L. J., Ch. 574.

⁷ *Id.*

event, the effect of the evidence would be to contradict the apparent meaning of the writing.¹

§ 1230. The important case of *Hall v. Hill*² affords a good illus- § 1112
tration of this distinction. There a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of 800*l.*, part to be paid during his life, and the residue at his decease. He subsequently by his will bequeathed to his daughter a legacy for 800*l.*, and the question was, whether this legacy could be considered as a satisfaction of the debt. Parol evidence of the testator's declaration was tendered to show that such was his real intention, and Lord Chancellor Sugden acknowledged that the evidence, if admissible, was conclusive on the subject.³ His lordship, however, finally decided, that though the debt was to be regarded in the light of a portion,⁴ yet as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instruments, or, rather, it could not, under the circumstances, be raised by the court; and the consequence was, that the declarations were rejected. Indeed, the evidence would have been equally inadmissible in the first instance, on the ground of its inutility, had the ordinary presumption arisen; though, in such case, had the opponent offered parol evidence to show that the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law.

§ 1231. With the view of clearly understanding the subject § 1113
under discussion, it is essential to distinguish between mere *legal*

¹ *Benham v. Newell*, 24 L. J., Ch. 429, per Romilly, M. R.; S. C. nom. *Palmer v. Newell*, 20 Beav. 32; 8 De Gex, M. & G. 74, S. C.

² 1 Dru. & War. 94. This case deserves an attentive perusal, the judgment of Sugden, C., containing an elaborate discussion of all the important authorities on the subject. The cases of *Wallace v. Pomfret*, 11 Ves. 542; *Coote v. Boyd*, 2 Br. C. C. 521; *Weall v. Rice*, 2 Russ. & Myl. 251, 263; *Booker v. Allen*, 2 Russ. & Myl. 270; and *Lloyd v. Harvey*, id. 310, are much shaken, if not overruled, by this decision.

³ 1 Dru. & War. 112.

⁴ Id. 108, 109.

presumptions and rules of construction; because, while the former may be rebutted, and if rebutted, supported also, by parol testimony, no evidence can be received on either side, if the court *by construction* can arrive at a conclusion respecting the meaning of the instrument.¹ Yet, important as it is to mark this distinction, it is by no means easy on all occasions to do so; and the difficulty is increased by the loose manner in which the word “presumption” has occasionally been used. Thus, instead of confining it to its strict sense, as meaning an inference raised by the courts independently of, or against, the words of an instrument, it is often employed as denoting an inference in favour of a given construction of particular language.² For instance, in *Coote v. Boyd*,³ Lord Thurlow says:—“Where the *presumption* arises from the construction of words, simply quâ words, no evidence can be admitted,”—evidently using the word presumption as tantamount to a rule of law. Among the rules of construction⁴ which have occasionally been mistaken for legal presumptions, may be mentioned the one now clearly established, which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain *intrinsic* evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts and the same expressed motives appearing in each instrument, induces the court to presume that repetition, and not accumulation, was intended.⁵ Extrinsic evidence cannot be received to impugn this rule; for to admit it would be to construe a writing by parol evidence.⁶

¹ *Lee v. Pain*, 4 Hare, 216, per Wigram, V.-C.; *Hall v. Hill*, 1 Dru. & War. 116, 122, 126, 132, 133, per Sugden, C.; *Barrs v. Fewkes*, 34 L. J., Ch. 522, per Wood, V.-C.

² *Lee v. Pain*, 4 Hare, 216, 217, per Wigram, V.-C.

³ 2 Br. C. C. 527.

⁴ For other rules of construction relating to wills, see 7 W. 4 & 1 V., c. 26, §§ 24—33; *Re George's Estate*, *King v. George*, 46 L. J., Ch. 670, per Ct. of App.; *Everett v. Everett*, L. R., 7 Ch. D. 428, per Lds. Js.; 47 L. J., Ch. 367, S. C.; *In re Ord*, L. R., 9 Ch. D. 667.

⁵ *Hurst v. Beach*, 5 Madd. 358; *Suisse v. Lowther*, 2 Hare, 424, 432, 433; *Lee v. Pain*, 4 Hare, 216—218; *Kirk v. Eddowes*, 3 Hare, 516; *Roch v. Callen*, 6 Hare, 531.

⁶ *Id.*

PART III.

INSTRUMENTS OF EVIDENCE.

CHAPTER I.

WITNESSES, AND THE MEANS OF PROCURING THEIR ATTENDANCE.

§ 1232. In the *Third Part* of this work, it is intended to treat § 1114
of the Instruments of evidence, or, in other words, of the means by
which facts are proved. In dealing with this subject an attempt
will be made to show how such instruments are obtained, in what
manner they are used, to what extent, and under what circum-
stances, they are admissible, and what is their effect.

§ 1233.¹ Now, the Instruments of Evidence are divided into two § 1115
classes, the *unwritten* and the *written*. By *unwritten*, or *oral evi-*
dence, is meant the testimony given by witnesses, *vivâ voce*, either
in open court, or before a magistrate or other officer, acting by virtue
of a commission or other legal authority. Under this head it is
proposed briefly to consider, first, the methods, in general, of pro-
curing the attendance and testimony of witnesses; secondly, the
competency of witnesses; and, thirdly, the practice which obtains
in the examination of witnesses, and herein, of the impeachment
and corroboration of their testimony.

§ 1234. In *criminal casès*, the ordinary and most effectual method § 1116
of enforcing the attendance of witnesses for the Crown is by *recog-*
nizance, which is a bond of record, testifying that the recognizer
owes the Queen a certain sum, to be levied on his goods and tene-
ments for the use of her Majesty, if he fail to appear and give
evidence at the time and place specified in the condition.² By

¹ Gr. Ev. §§ 307, 308, in great part.

² See form in Sch. O. 1, to 11 & 12 V., c. 42.

statute 11 & 12 V., c. 42, § 20, the justice before whom the preliminary investigation is heard, is authorised in all cases, whether of felony or misdemeanor, to bind by recognizance all such persons as know the facts or circumstances of the case, to appear and give evidence before the grand jury and at the trial against the party accused;¹ and the Act of 7 G. 4, c. 64, gives similar power to all coroners taking an inquisition, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact.²

§ 1235. These provisions, which respectively apply to justices § 1117 and coroners, not only of counties, but of all other jurisdictions,³ are obviously of great use in promoting the due administration of justice: but, in order to avoid any hardship which, in the event of non-attendance, witnesses might incur from having their recognizances indiscriminately estreated, it is enacted, that the officer of the court, by whom the estreats are made out, shall prepare a written list of defaulters, specifying the name, residence, and trade or profession of each, the nature of the offence respecting which he was to testify, the cause, if known, of his absence, and the fact whether by reason of his non-attendance the ends of justice have been defeated or delayed. This list must then be laid before the judge at the assizes, or before the recorder or other corporate officer, or the chairman or two other justices of the peace at the sessions, who are respectively required to examine it, and to make such order touching the estreating of the recognizances as they shall consider just; but no recognizance can be estreated or put in process, without the written order of the presiding judge or other persons, before whom the list has been laid.⁴ If the witness, after having been examined

¹ The correspond. Irish Act, 14 & 15 V., c. 93, enacts in § 13, cl. 6, that "whenever in cases of indictable offences the justice or justices shall see fit, they may bind the witnesses by recognizance to appear at the trial of the offender and give evidence against him," and if such witnesses refuse to be bound they may be committed. The form of the recognizance is given in the Sch.

² 7 G. 4, c. 64, § 4; 9 G. 4, c. 54, § 4, Ir.

³ 11 & 12 V., c. 42, §§ 1, 16, 20; 7 G. 4, c. 64, § 6; 14 & 15 V., c. 93, § 44, Ir.

⁴ 7 G. 4, c. 64, § 31; 9 G. 4, c. 54, § 34, Ir.

on oath before the magistrate or coroner, shall refuse to be bound over, he may be committed;¹ and where a married woman, who could not enter into her own recognizances, refused either to appear at the sessions or to find sureties for her appearance, the court held that the justice was fully warranted in committing her, in order that she might be forthcoming as a witness at the trial.² It seems that a recognizance to prosecute or give evidence is binding on an infant; at least, it has been held that infancy is no ground for discharging a forfeited recognizance to appear at the assizes to prosecute for felony:³ but the better opinion is, that a justice is not authorised to commit any witness for refusing to find sureties to be bound with him, provided he be willing to enter into his own recognizance.⁴

§ 1236. This mode of enforcing attendance on criminal trials is not confined to witnesses for the Crown, but extends equally to those whom the accused wishes to call on his behalf. By an Act passed in 1867, it is rendered necessary that the committing justice should ask the accused "whether he desires to call any witnesses," and if he answers in the affirmative, the witnesses are sworn, and examined, and their depositions are reduced to writing.⁵ The statute then goes on to enact, that "such witnesses,—not being witnesses merely to the character of the accused,—as shall in the opinion of the justice give evidence in any way material to the case, or tending to prove the innocence of the accused, shall be bound by recognizance to appear and give evidence at the trial."⁶ § 1117A

§ 1237. Neither is the procedure by recognizance limited to indictable offences, but it may be adopted in several cases, where an appeal lies to the sessions from the conviction of one or more jus- § 1118

¹ 11 & 12 V., c. 42, § 20; 2 Hale, P. C. 282; *Bennet v. Watson*, 3 M. & Sel. 1; 9 G. 4, c. 54, § 2, Ir. See *Ashton's case*, 7 Q. B. 169.

² *Bennet v. Watson*, 3 M. & Sel. 1.

³ *Ex parte Williams*, 13 Price, 670; *M'Clel.* 493, S. C.

⁴ *Per Graham, B.*, as cited 2 Burn, Just. 122; *per Ld. Denman in Evans v. Rees*, 12 A. & E. 59.

⁵ 30 & 31 V., c. 35, §§ 3 & 4, cited ante, § 490, n. 4.

⁶ *Id.* § 3.

tices. Thus, for example, the statute for the punishment of rogues and vagabonds¹ enacts, in § 9, that when any justice shall commit any incorrigible rogue to the house of correction, there to remain till the next sessions, or when any idle or disorderly person, rogue and vagabond, or incorrigible rogue, shall give notice of his intention to appeal, and shall enter into recognizances to prosecute such appeal, such justice shall require the person by whom such offender shall be apprehended, and the persons whose evidence shall appear material to prove the offence, and to support such conviction, to become bound in recognizance to appear at the sessions, to give evidence against such offender; and the justices at sessions, are empowered to order the treasurer of the county, &c., to pay such sum to the prosecutor and witnesses, as will reimburse them for their expenses and trouble and loss of time; and in case any such person shall refuse to enter into such recognizance, the justice may commit him to prison.

§ 1238. Similar clauses, varied, as to their language, according to the taste or practical knowledge of the draughtsmen, are scattered through the volumes of the statutes;² though in numerous instances, as in the Larceny Act,³ the Act relating to malicious injuries to property,⁴ the Game Acts,⁵ the Acts regulating coal mines and metalliferous mines,⁶ the Act to prevent frauds of manufacturers,⁷ the Lunatic Asylums Act of 1853,⁸ "The Seamen's Clothing Act, 1869,"⁹ and in many more that might be cited, the power of binding witnesses by recognizance is omitted in the clauses giving an appeal to the sessions. § 1119

§ 1239.¹⁰ A second mode of procuring the attendance of witnesses, which may be adopted in criminal cases, and which con- § 1120

¹ 5 G. 4, c. 83.

² See the Act for the suppression of Gaming Houses, 17 & 18 V., c. 38, § 10; and that regulating the slaughter of horses, 7 & 8 V., c. 87, § 9. All these enactments have been partially repealed by 47 & 48 V., c. 43, § 4, and Sch., but the repeal does not touch the law referred to in the text.

³ 24 & 25 V., c. 96, § 110.

⁴ 24 & 25 V., c. 97, § 68.

⁵ 1 & 2 W. 4, c. 32, § 44; 9 G. 4, c. 69, § 6.

⁶ 35 & 36 V., c. 76, § 61; and c. 77, § 32.

⁷ 6 & 7 V., c. 40, § 29.

⁸ 16 & 17 V., c. 97, § 128. All these enactments have been partially repealed by 47 & 48 V., c. 43, § 4, and Sch., but the repeal does not touch the law referred to in the text.

⁹ 32 & 33 V., c. 57, § 6.

¹⁰ Gr. Ev., § 309, in part.

stitutes the ordinary summons in civil proceedings, is by serving the witnesses with a writ of *subpœna ad testificandum*. This is a judicial writ, which the proper officer, on production to him of a præcipe in due form for filing,¹ is bound to issue at the instance of the party applying for it, without any order of the court for that purpose having first been obtained.² It must, in the High Court, be in one or other of six Forms given in the New Rules;³ and it is directed to the witness, commanding him in the Queen's name to attend at the court, and to give evidence in a cause pending therein, which is described in the writ. If the witness be required to produce any documents, a clause to that effect is inserted in the writ, which is then termed a *subpœna duces tecum*.

§ 1240. This last form of subpœna must specify with reasonable distinctness the particular documents required; and a general direction to produce all papers relating to the subject in dispute will not be enforced.⁴ When a witness is served with a subpœna duces tecum, he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the judge, who will decide upon the validity of any excuse that may be offered for withholding them.⁵ An attachment, therefore, will lie against an overseer or solicitor of a parish, who, in an inquiry touching the settlement of a pauper, refuses to bring the rate-books of such parish to the petty sessions, in obedience to a Crown-office subpœna; though it may be very questionable whether he would be bound to submit these books to examination, in the event of his bringing them into court.⁶ So, the fact that the legal custody of the instrument belongs to another person will not authorise a witness to disobey the subpœna, provided the instrument be in his actual possession;⁷ but

¹ Rules of Sup. Ct., 1883, Ord. XXXVII., R. 26, and Form 21 in App. G.

² *Holden v. Holden*, and *Hill v. Dolt*, 7 De Gex, M. & G. 397.

³ See Ord. XXXVII., R. 27, and Forms 1, 3—7, in App. J.

⁴ *Lee v. Angas*, 35 L. J., Ch. 370; 1 Law Rep., Eq. 59, S. C., per Wood, V.-C.; *Att.-Gen. v. Wilson*, 9 Sim. 526.

⁵ *Amey v. Long*, 9 East, 473; 6 Esp. 116; 1 Camp. 14, S. C. See, ante, § 23; and as to what is a valid excuse, see ante, §§ 458—460.

⁶ *R. v. Greenaway*, and *R. v. Carey*, 7 Q. B. 126.

⁷ *Amey v. Long*, 1 Camp. 14, per Ld. Ellenborough.

documents filed in a public office are not so in the possession of the clerk, as to render it necessary, or even allowable, for him to bring them into court without the permission of the head of the office.¹ Neither will the secretary of a company be exposed to an attachment for declining to produce at a trial documents, which have been entrusted to him simply as a servant of the company, and which the directors have specially forbidden him to produce.²

§ 1241. A writ of subpœna, though commanding the witness to attend "from day to day until the cause be tried," suffices for only one sitting of the court, or for one assize; and, therefore, if the cause be made a remanet, or be adjourned to another session, or assize, the writ must be resealed, and the witness summoned anew.³ Again, if any alteration be made in the writ, after it is sued out, though before it is served, it must be resealed;⁴ and, therefore, when the day of appearance named in a subpœna was altered by an attorney from one term to another, it was held that the writ thereby became void, and that the witness, on whom it was served subsequently to the alteration, might treat it as waste paper.⁵

§ 1241A. An ordinary writ of subpœna differs in this respect from a subpœna duces tecum, that while the former "contains three names when necessary or required, and may contain any larger number of names,"⁶ the latter cannot include more than three persons, and the party suing it out may, if it be deemed desirable, have a separate writ for each person.⁷

§ 1542.⁸ The service of a subpœna upon a witness is of no validity if not made within twelve weeks after the *teste* of the writ.⁹ It

¹ *Thornhill v. Thornhill*, 2 Jac. & W. 347; *Austin v. Evans*, 2 M. & Gr. 430.

² *Crowther v. Appleby*, 43 L. J., C. P. 7; 9 Law Rep., C. P. 23, S. C.

³ *Sydenham v. Rand*, 3 Doug. 429; S. C. cited 2 Tidd, 855, 8th ed.

⁴ See Ord. XXXVII., R. 31.

⁵ *Barber v. Wood*, 2 M. & Rob. 172, per Ld. Abinger.

⁶ Ord. XXXVII., R. 29.

⁷ R. 30.

⁸ Gr. Ev. § 314, in part.

⁹ R. 34.

must also in all cases be made a *reasonable time* before trial, to enable the witness to put his affairs in such order, that his attendance on the court may be as little detrimental as possible to his interests.¹ On this principle, a summons in the morning to attend in the afternoon of the same day, has more than once been held insufficient, though the witness lived in the same town, and very near to the place of trial.² Where, however, a witness was served at noon, while standing on the steps of the court-house, and being then told that the cause was coming on that day, replied, "very well," the court held that his non-attendance at five o'clock, when the trial was heard, rendered him liable to an action, since his answer was equivalent to an admission that the service was in time.³ So, if a witness attend a trial in obedience to a subpœna, he cannot refuse to be examined on the ground of any irregularity in the service.⁴ So, if a witness be in court as a spectator, he cannot, it seems, object to give evidence, on the ground that the subpœna has only just been served upon him;⁵ though, if he be a solicitor, who is engaged in winding up another cause, the rule may be different; or at least, it is highly probable that he would not be liable to an attachment for disobedience.⁶ Neither in criminal prosecutions can a witness decline to be sworn, though he has not been subpœnaed at all.⁷ But in civil cases a witness may always refuse to be examined, unless he be properly served with a writ.⁸

§ 1243. Where a subpœna, requiring the attendance of a witness § 1123
on the 31st of March, and so on from day to day until the action

¹ *Hammond v. Stewart*, 1 Str. 510.

² *Id.*; *Barber v. Wood*, 2 M. & Rob. 172, per Ld. Abinger.

³ *Maunsell v. Ainsworth*, 8 Dowl. 869, per Parke and Alderson, Bs.; *Jackson v. Seagar*, 2 Dowl. & L. 13, per Wightman, J.

⁴ *Wisden v. Wisden*, 6 Beav. 549, per Wigram, V.-C.

⁵ *Doe v. Andrews*, 2 Cowp. 845.

⁶ *Pitcher v. King*, 2 Dowl. & L. 755, per Williams, J.

⁷ *R. v. Sadler*, 4 C. & P. 218, per Littledale, J.

⁸ *Bowles v. Johnson*, 1 W. Bl. 36. See *contra*, *Blackburn v. Hargreave*, 2 Lew. C. C. 259, where Hullock, B., is reported to have held, that, if a witness be in court, having come there on other business, he cannot refuse to be sworn, though his expenses be not tendered. Sed. qu. A witness is not bound to obey a subpœna in a civil cause, unless his expenses be tendered, although the party, who requires his testimony, is suing in formâ pauperis. 2 Lew. C. C. 259, per Hullock, B.

should be tried, was served on the 2nd of April, when the witness was distinctly told that the trial had not come on, he was held civilly responsible for disobeying the writ on the 6th of April when the cause was heard;¹ though, had he received no notice at the time of service that the cause had not then been tried, the result might have been different, and he would at least have avoided the penalty of an attachment.² As the question whether the writ has been served within a reasonable time is in the discretion of the judge,³ and must vary according to the circumstances of each case, it is hoped that the decisions cited above will sufficiently illustrate the general practice;⁴ but it deserves notice, that, in the United States, the reasonableness of the time is generally fixed by statute, one day being usually allowed for every twenty miles that intervene between the residence of the witness and the place of trial. Perhaps a somewhat similar rule might, with advantage, be adopted in this country.

§ 1244. Under the New Rules of 1883, “the *service* of a § 1124 subpœna shall be effected by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ.”⁵ Personal service will not be dispensed with, even though it be sworn that the witness keeps out of the way to avoid such service;⁶ and the provision, which requires the production of the original writ at the time of serving the copy, must be strictly followed, since otherwise the witness cannot be chargeable with a contempt in not appearing upon the summons.⁷ Again, “affidavits filed for the purpose of proving the service of a subpœna upon any *defendant*, must state when, where, and how, and by whom, such service was

¹ Davis v. Lovell, 7 Dowl. 178.

² Id. 183; Alexander v. Dixon, 1 Bing. 366; 8 Moore, 387, S. C.

³ Barber v. Wood, 2 M. & Rob. 172; ante, § 23.

⁴ See, further, the analogous cases, respecting the reasonable service of a notice to produce, ante, § 445.

⁵ Ord. XXXVII., R. 32.

⁶ See In re Pyne, 1 Dowl. & L. 703.

⁷ Wadsworth v. Marshall, 1 C. & M. 87; R. v. Wood, 1 Dowl. 509, per Littledale, J.; Garden v. Cresswell, 2 M. & W. 319; 5 Dowl. 461, S. C.; Jacob v. Hungate, 3 Dowl. 456; Pitcher v. King, 2 Dowl. & L. 755, per Williams, J.

effected." Such is the language of Rule 33, which certainly raises a curious question as to "when, where, how, and by whom" the word defendant has become part of the sentence.

§ 1245. If the copy of the writ vary in any material degree from the original subpœna, as where the copy required the witness to attend on the 24th of May, and the writ itself specified the 27th, an attachment for disobedience cannot be obtained.¹ So, the writ must state, with reasonable certainty, the name of the cause, as also the place in which the attendance of the witness is required.² Where, however, the subpœna required the attendance of the witness at Westminster Hall, the Nisi Prius sittings being in fact held at the adjoining sessions-house, it was ruled that an attachment might be granted for non-attendance at the sessions-house, notices having been affixed to the wall of the court in Westminster Hall, directing witnesses to proceed to that place.³ So, where a subpœna, tested the 9th of May and served on the 19th required attendance on the 21st of March instant, the court considered that this was an error which could not mislead.⁴ § 1125

§ 1246. In order the more effectually to secure the attendance of witnesses in civil cases, the Act of 5 El., c. 9,—made perpetual by 26 & 27 V., c. 125,—enacts, in § 12, that, if any person, upon whom any process of subpœna out of a Court of Record shall be served, "and having tendered to him, according to his countenance or calling, such reasonable sum for his costs and charges, as, having regard to the distance of the places, is necessary to be allowed," shall, without lawful cause, neglect to appear, he shall *forfeit* 10*l.*, and yield such further recompense to the party aggrieved, as the judge in his discretion shall award. The question as to what constitutes the "*reasonable costs and charges*" of a witness under this statute was left, in former times, very much to the discretion of the taxing officers; but that question is now, so far as it relates § 1126

¹ Doe v. Thomson, 9 Dowl. 948, per Wightman, J.

² 1*d.*; Swanne v. Taaffe, 8 12. Law R., 101; Milson v. Day, 3 M. & P. 333.

³ Chapman v. Davis, 1 Dowl. N. S. 239; 4 Scott, N. R. 319; 3 M. & Gr. 609, S. C.

⁴ Page v. Carew, 1 C. & J. 514.

to all the divisions of the Supreme Court, happily set at rest by the formal adoption of a partially fixed scale of remuneration. That scale will be found set out at length in the Appendix; and it is only here necessary to refer to a somewhat exacting Rule of Court, which the learned judges,—displaying, perhaps, a pardonable zeal in favour of their own functionaries,—have recently promulgated, and which runs thus :—

“Any officer of the Central Office, being required to attend with any record or document at any assizes or at any court or place out of the Royal Courts of Justice, shall be entitled to require that the solicitor or party desiring his attendance shall deposit with him a sufficient sum of money to answer his just fees, charges, and expenses in respect of such attendance, and undertake to pay any further just fees, charges, and expenses which may not be fully answered by such deposit.”¹

§ 1246A. In the Courts of Bankruptcy the allowances to witnesses are the same as in the High Court, excepting² only that a petitioning creditor is not to be regarded as a witness, or to be paid for loss of time, though he may claim his expenses of travelling and subsistence.³ In the Court for the trial of either Parliamentary or Municipal Election Petitions, the scale of remuneration is identical with that adopted in the High Court;⁴ but in the County Courts,⁵ which aim at bringing justice within the reach of the poor, witnesses are less liberally remunerated than in the Royal Courts of Justice.

§ 1247. Although the scale of allowance to witnesses, as now § 1127 fixed by Rule, has been framed principally with reference to persons who are subpœnaed to attend trials at Nisi Prius, the taxing masters will occasionally be justified,⁶ under special circumstances, in allow-

¹ Rules of Sup. Ct., 1883, Ord. LXI., R. 29.

² Ord. of 1884 under Bankruptcy Act, cited 53 L. J., Ord. & Rules, p. 76.

³ Id. 53 L. J., Ord. & Rules, p. 73.

⁴ 31 & 32 V., c. 125, § 34, continued till 31 of Dec., 1884, by 46 & 47 V., c. 51, § 70; 45 & 46 V., c. 50, § 94, subs. 9. See *McLaren v. Home*, L. R. 7 Q. B. D. 477; S. C. nom. *McLaren v. Horne*, 50 L. J., Q. B. 658.

⁵ See Appendix for the scale

⁶ See *D. of Beaufort v. Ld. Ashburnham*, 32 L. J., C. P. 97; 13 Com. B., N. S., 598, S. C. See *Churton v. Frewen*, 46 L. J., Ch. 660.

ing costs for the attendance of witnesses who have not been subpoenaed, or for the detention of witnesses beyond the actual period of the trial, or for services rendered by skilled witnesses, who either prior to the trial have been employed under the direction of the court,¹ or at the trial have been retained to watch the testimony of other witnesses.² Moreover, a special rule has recently been framed as applicable alike to all the Divisions of the Supreme Court, which, —rejecting the old practice of the Common Law Courts,³ and adopting that of the Court of Chancery,⁴—provides that, “as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.”⁵ By virtue of this rule the master may, in the exercise of his discretion, allow to *scientific* witnesses for their attendance larger sums than can be awarded to ordinary witnesses under the general scale of allowances.⁶ The term “*procuring evidence*,” as used in the Rule, is certainly somewhat vague, but it has been held to include all preliminary costs incurred in *qualifying* witnesses to give evidence at the trial.⁷ Again, if a foreign witness, who is not accessible by subpoena, but whose evidence is material in the cause, refuses to leave his home unless he be remunerated for his trouble, the compensation paid to him, if reasonable in amount, will generally be allowed and taxed against the losing party;⁸ and where the captain of a ship has been detained for a long time in this country in order to give evidence on a trial, large sums, calculated at a guinea a-day, and amounting in the whole to above 100*l.*, have been allowed for his detention.⁹

¹ Robb v. Connor, I. R., 9 Eq. 373.

² Ryan v. Dolan, I. R., 7 Eq. 92.

³ See Nolan v. Copeman, 8 Law Rep., Q. B. 84; 42 L. J., Q. B. 44, S. C.; May v. Selby, 4 M. & Gr. 142; Murphy v. Nolan, I. R., 7 Eq. 498, 500.

⁴ Batley v. Kynock, 20 Law Rep., Eq. 632; 44 L. J., Ch. 565, S. C.; Smith v. Butler, 19 Law Rep., Eq. 473.

⁵ Ord. LXV., R. 27, snbs. 9 of Rules of Sup. Ct., 1883.

⁶ Turnbull v. Janson, L. R., 3 C. P. D. 264; 47 L. J., C. P. 384, S. C.

⁷ Mackley v. Chillingworth, 46 L. J., C. P. 484; L. R., 2 C. P. D. 273, S. C.; Turnbull v. Janson, L. R., 3 C. P. D. 264.

⁸ Lonergan v. Roy. Ex. Ass., 7 Bing. 725; id. 729, S. C.; Tremain v. Barrett, 6 Taunt. 88; 1 Marsh. 463, S. C.

⁹ Stewart v. Steele, 4 M. & Gr. 669; Mount v. Larkins, 8 Bing. 195; 1 M. & Sc. 357; 1 Dowl. 262, S. C.; Temperley v. Scott, 8 Bing. 392; 1 M. & 15 LAW OF EVID.—V. III. (3927)

So,—although it is not a general rule, either that parties, if witnesses in their own favour, are to have an allowance for their attendance at the trial, or that after a rule for a new trial has been obtained, witnesses may be detained at the cost of the losing party,—the court, under very special circumstances, has allowed in taxation of costs, subsistence money to a seafaring man, who was a necessary witness in his own cause, and who, after having obtained a verdict, remained in England until a rule for a new trial, granted at the instance of his opponent, had been discharged.¹ Where no special circumstances intervene, the expenses of the attendance of witnesses on the commission day of the assizes will not be allowed as against the losing party on taxation of costs.²

§ 1249. The reasonable expenses of a witness ought to be tendered to him at the time when he is served with the subpoena,³ or, at least, a reasonable time before the trial;⁴ and even though he actually appears, he cannot be attached for declining to give evidence, unless these charges are paid or tendered.⁵ He has, however, no right to refuse to be examined on the ground that the expenses incurred by him on former attendances have not been paid.⁶ If the witness be a married woman, the money should, it seems, be tendered to her, rather than to her husband;⁷ and if a person be subpoenaed by both parties, he is entitled, before giving evidence to be paid by the party actually calling him all the expenses to which he will be liable, after exhausting what he may have received from the opposite side.⁸ Of course the witness may waive his right to demand the payment of his expenses, and if he does so, either

Sc. 601, S. C.; *Potter v. Rankin*, 5 Law Rep., C. P. 518; *Evans v. Watson*, 3 Com. B. 327; *Berry v. Pratt*, 1 B. & C. 276. See the *Bahia*, 1 Law Rep., Adm. & Ecc. 15; *The Karia*, B. & Lush., Adm. 367.

¹ *Dowdell v. Austral. Roy. Mail Co.*, 3 E. & B. 902. See *Howes v. Barber*, 18 Q. B. 588; *Calvert v. Scinde Ry. Co.*, 18 Com. B., N. S. 306.

² *Harvey v. Divers*, 16 Com. B. 497.

³ *Fuller v. Prentice*, 1 H. Bl. 49.

⁴ *Horne v. Smith*, 5 Taunt. 9; 1 Marsh, 410, S. C.; 13 East, 16, n. a.

⁵ *Bowles v. Johnson*, 1 W. Bl. 36; *Newton v. Harland*, M. & Gr. 956; 9 Dowl. 16, S. C.; *Brocas v. Lloyd*, 23 Beav. 129; 26 L. J., Ch. 758, S. C.

⁶ *Gaunt v. Johnson*, 6 Beav. 551.

⁷ *Cro. El.* 122; *W. Jon.* 430.

⁸ *Allen v. Yoxall*, 1 C. & Kir. 315, per Rolfe, B.; *Betteley v. M'Leod*, 3 Bing. N. C. 495, 407; 5 Dowl. 481, S. C.

directly, by agreeing to take a less sum than that to which he is entitled,¹ or indirectly, by accompanying the parties to the place of trial without previously making any claim,² he will be liable to all the consequences of disobedience, should he subsequently refuse to appear as a witness.³

§ 1250. The law is not very clear as to what circumstances will justify a witness, who, in obedience to a subpoena, has attended a trial in a civil cause, in bringing an action for his "costs and charges," and the following propositions are submitted with some hesitation. First, the witness can maintain such an action against the party to the suit who has subpoenaed him, if any express contract has been made upon the subject;⁴ secondly, the better opinion seems to be, that the jury may reasonably infer a promise to pay from the mere fact of the attendance of the witness at the trial, and that where such an inference is drawn, the action can be supported by the implied contract;⁵ thirdly, a witness cannot recover any larger amount than the sum specified in the scale of allowance as fixed by the judges, even though he rests his claim on an express promise;⁶ and, lastly, no action can be brought by the witness against the solicitor who subpoenaed him, on an implied contract to pay the expenses of attendance,⁷ though probably the witness may succeed, if he can establish the fact of an express agreement having been made to that effect.⁸ 1130

§ 1251. It here deserves notice, that conduct money received by a witness with a subpoena may be recovered back by the party who paid it, as money had and received, where the attendance of the witness has become unnecessary, and no expenses have been incurred under the writ.⁹ 1130A

¹ *Betterly v. M'Leod*, 3 Bing. N. C. 405.

² *Newton v. Harland*, 1 M. & Gr. 956. In that case, the witness having accompanied the plaintiffs to the place of trial, and lived with them there, was deemed to have waived her right to remuneration up to the time of the trial, though she was held to be still entitled to claim her fair expenses for returning home.

³ *Goodwin v. West*, Cro. Car. 522, 540.

⁴ *Hallet v. Mears*, 13 East, 15; *Goodwin v. West*, Cro. Car. 522, 540.

⁵ *Pell v. Daubeny*, 5 Ex. R. 955.

⁶ *Willis v. Peckham*, 1 B. & B. 515; *Collins v. Godefroy*, 1 B. & Ad. 950.

⁷ *Robins v. Bridge*, 3 M. & W. 114; *Lee v. Everest*, 2 H. & N. 285.

⁸ *Robins v. Bridge*, 3 M. & W. 114; and cases there cited. Also *Lee v. Everest*, 2 H. & N., 289, 292, per Bramwell, B.

⁹ *Martin v. Andrews*, 26 L. J., Q. B. 39; 7 E. & B. 1, S. C.

§ 1252.¹ In *criminal cases*, *no tender of fees* is in general necessary, either on the part of the Crown or of the prisoner, in order to compel the attendance of the respective witnesses;² and this rule will prevail, though the indictment has been removed by certiorari, and is, consequently, tried in the *Nisi Prius Court*.³ An exception, however, has been recognised by the Legislature in favour of those witnesses, who, living in one distinct part of the United Kingdom, are required to obey subpœnas directing their attendance in another; and who are not liable to punishment for disobedience of the process, unless, at the time of service, a reasonable and sufficient sum of money, to defray their expenses in coming, attending, and returning, has been tendered to them.⁴ Another exception would seem to be recognised in courts-martial, when any person who is *not* subject to military law is summoned as a witness; for although the Army Act, 1881, contains no positive enactment enforcing the payment of fees to such a witness, he cannot be punished for making default in his attendance, unless he has been paid or tendered his reasonable expenses.⁵ § 1131

§ 1253. Although witnesses in Crown cases cannot,—except under the circumstances just stated,—claim, as a matter of right, the payment of their expenses, it being considered by the law to be the public duty of every citizen to obey a call of this description; yet, in order to encourage the due prosecution of offenders, the Legislature has authorised the Courts of Criminal Law to grant to those prosecutors and witnesses for the Crown who attend on recognizance⁶ or subpœna,⁷ such costs as will reimburse them for the expenses § 1132

¹ Gr. Ev. § 311, as to the first three lines.

² *Pell v. Daubeney*, 5 Ex. R. 957, per Parke and Alderson, Bs.; per Bayley, J., cited 2 Russ. C. & M. 948, n. a; *R. v. Cousins*, id. per Wightman, J.; *R. v. Cooke*, 1 C. & P. 322, per Parke, J., and Garrow, B.

³ *R. v. Cooke*, 1 C. & P. 322. See post, § 1256.

⁴ 45 Gr. 3, c. 92, § 4. See also 44 & 45 V., c. 24, § 4, subs. 3; and 44 & 45 V., c. 69, §§ 15 and 27.

⁵ 44 & 45 V., c. 58, § 126, subs. 1a.

⁶ A party will be entitled to his expenses under this term, though he has been bound over to prosecute by the Quart. Sess., *R. v. Paine*, 7 C. & P. 136.

⁷ The expenses of a prosecutor, whose name is included in a subpœna, are not confined, under this term, to his costs as a witness only, though he has

they have incurred, or shall incur,¹ in all cases of felony,² excepting those offenses which are declared felonies, either under the Act passed in the year 1848, for the better security of the Crown and Government,³ or, perhaps, under the Act of 1861, relating to offences against the coin.⁴

§ 1254. Similar powers of awarding costs are also conferred on the courts, when persons are prosecuted for any of the following
 not been bound over by the magistrate to prosecute, *R. v. Sheering*, 7 C. & P. 440, by all the judges. See *R. v. Jeyes*, 3 A. & E. 416. § 1133

¹ The judge, who reserves a case for the opinion of the Court for Crown Cases Reserved, may allow the prosecutor the costs he will incur in arguing such case; and the officer of the court above will tax and ascertain such costs, and certify the amount to the officer of the court below, *R. v. Lewis, Dear. & Bell*, 326; *R. v. Cluderoy*, 3 C. & Kir. 205.

² 7 G. 4, c. 64, § 22, enacts, that "the court before which any person shall be prosecuted or tried for any felony is hereby authorised and empowered, at the request of the prosecutor or of any other person, who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of *any felony*, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the court shall seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bonâ fide* have attended the court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient, to reimburse such person for the expenses which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna; and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned." See 6 & 7 W. 4, c. 116, § 105, *Ir.*; and 7 & 8 V., c. 106, § 40, *Ir.*

³ 11 & 12 V., c. 12, § 10, enacts, that "it shall not be lawful for any court before which any person shall be prosecuted or tried for any felony under this Act, to order payment to the prosecutor or the witnesses of any costs, which shall be incurred in preferring or prosecuting any such indictment."

⁴ 24 & 25 V., c. 99, § 42, cited post, § 1255.

misdeemeanors or offences:—an attempt to commit felony;¹ an assault with intent to commit felony;² an assault upon a peace officer in the execution of his duty, or upon any person acting in his aid;³ an assault in pursuance of any conspiracy to raise the rate

¹ 7 G. 4, c. 64, § 23, after reciting that “for want of power in the court to order payment of the expenses of any prosecution for a *misdeemeanor*, many individuals are deterred by the expense from prosecuting persons guilty of misdeemeanors, who thereby escape the punishment due to their offenses;” for remedy thereof, enacts, that “where any prosecutor or other person shall appear before any court, on recognizance or subpœna, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdeemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury, every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witness for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorised and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have bonâ fide attended the court in obedience to any such recognizance, to order payment of the expenses of any such person, together with a compensation for his or her trouble and loss of time, in the same manner in cases of felony.” This section originally contained a proviso, “that in cases of misdeemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate;” but that proviso is now repealed by § 1 of 14 & 15 V., c. 55. §§ 24 & 25 of 7 G. 4, c. 64, further provide, that the order for payment shall be made out by the proper officer of the court, and that the money shall be paid by the treasurer of the county, &c., or by such other person as is mentioned in the Act. If the treasurer refuses to pay the expenses in obedience to the order, the remedy is by indictment, and not by mandamus, *R. v. Jeyes*, 3 A. & E. 416. See 5 A. & E. 812, n.; but to render the treasurer liable to prosecution, the entire order of the court must be served upon him; and therefore, where the order was to pay an aggregate sum, the details being annexed, and the attorney tore off the paper containing the details, it was held that the treasurer was justified in refusing to pay, *R. v. Jones*, 2 Moo. C. C. 171, 9 C. & p. 401, S. C. § 27 of the Act provides for the payment of the expenses of prosecutions in the Court of Admiralty. The stat. 4 & 5 W. 4, c. 26, § 12, enacts, that any two judges of the Central Criminal Court may order the costs of prosecutors and witnesses to be paid by the treasurer of the county in which, but for that Act, the offender would have been tried. See 7 & 8 V., c. 106, § 40, Ir., as to what remuneration will be allowed to prosecutors and witnesses attending the trial of misdeemeanors in the county of Dublin.

² 7 G. 4, c. 64, § 23, cited in last note.

³ *Id.*

of wages;¹ the receiving stolen property, knowing it to have been stolen;² riot;³ perjury;⁴ subornation of perjury;⁵ neglect or breach of duty as a peace officer;⁶ obtaining property by false pretences;⁷ wilful and indecent exposure of the person;⁸ endeavouring to conceal the birth of a child;⁹ carnal knowledge of girls between the ages of ten and twelve;¹⁰ taking or causing to be taken any unmarried girl under the age of sixteen years from her father, mother, or guardian;¹¹ conspiring to charge any person with felony, or to indict him for felony;¹² conspiring to commit any felony;¹³ committing any corrupt practice, whether it be a felony; or misdemeanor, either at a parliamentary¹⁴ or at a municipal¹⁵ election, and all misdemeanors under the Merchant Shipping Act, 1854,¹⁶ under the Act of 14 & 15 V., c. 19,¹⁷ or under any of the Acts of 1861,

¹ Id.

² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ 7 W. 4 & 1 V., c. 44, enacts, that "where any prosecutor or other person shall appear before any court, on recognizances or subpœna, to prosecute or give evidence against any person upon any charges of having *endeavoured to conceal the birth of any child*, every such court is hereby authorised and empowered, whether any bill of indictment for such charge shall or shall not be actually preferred, to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution together with a compensation for their troubles and loss of time, in the same manner as courts are now by law authorised and empowered to order the same in cases of prosecution for felony."

¹⁰ 14 & 15 V., c. 55, § 2, extends the power of allowing costs to cases, where parties are indicted for "unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years; unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony."

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ 46 & 47 V., c. 51, § 53, embodying §§ 10 & 13 of 17 & 18 V., c. 102; continued till 31 Dec., 1885, by 47 & 48 V., c. 53; and applied to prosecutions under 47 & 48 V., c. 70, by § 30 of that Act.

¹⁵ 45 & 46 V., c. 50, § 84; now repealed by 47 & 48 V., c. 70, § 38, but substantially re-enacted by § 30 of that Act.

¹⁶ 17 & 18 V., c. 104, § 518, enacts, that "every offence by this Act declared to be a misdemeanor shall be punishable by fine or imprisonment, with or without hard labour; and the court before which such offence is tried may, in England, make the same allowances and order payment of the same costs and expenses, as if such misdemeanor had been enumerated in the Act 7 G. 4, c. 64, or any other Act that may be passed for the like purpose; and may, in any other part of her Majesty's dominions, make such allowances and order payment of such costs and expenses (if any), as are payable or allowable upon the trial of any misdemeanor under any existing Act or ordinance, or as may be payable or allowable under any Act or law for the time being in force therein."

¹⁷ § 14.

relating to larcenies, to malicious injuries to property, to forgery, or to offences against the person.¹

§ 1255. The Act of 1861, relating to offence against the coin,² § 1133A contains a peculiar enactment on the subject of costs; for § 42 provides, that, "in all prosecutions for any offence against this Act, in England, which shall be conducted under the direction of the Solicitors of Her Majesty's Treasury, the Court * * * *shall* allow the expenses of the prosecutors, in all respects as in cases of felony; and in all prosecutions for any such offence, in England, which shall not be so conducted, it shall be *lawful* for such court, *in case a conviction shall take place, but not otherwise*, to allow such expenses." Again, if a bankrupt be prosecuted by order of any court, for any misdemeanor under the Debtor's Act, 1869, or the Bankruptcy Act, 1883, the costs of the prosecution will only be allowed on production of the order.³

§ 1256. The Acts, which authorise the awarding of costs to § 1334 prosecutors and witnesses for the Crown in criminal trials, do not apply to cases where the indictment has been removed into the Queen's Bench Division of the High Court by certiorari;⁴ and no distinction appears to be recognised in this respect between a removal by the prosecutor and a removal by the defendant.⁵ Where the Acts do apply, all extra expenses incurred in getting up a prosecution may be reimbursed, *except* the attendance of witnesses before the coroner.⁶ Thus, where a witness, in consequence of being taken ill during his attendance at the trial, was put to some extra charges,

¹ 24 & 25 V., c. 96, § 121; 24 & 25 V., c. 97, § 77; 24 & 25 V., c. 98, § 54; 24 & 25 V., c. 100, § 77.

² 24 & 25 V., c. 99.

³ 32 & 33 V., c. 62, § 17; 46 & 47 V., c. 52, § 149, sub. 2, and § 166; 35 & 36 V., c. 57, § 17, Ir.; *R. v. Thomas*, 11 Cox, 535. See *Ex p. Berry*, 27 Law Times, 53.

⁴ *R. v. Kelsey*, 1 Dowl. 481; *R. v. Richards*, 8 B. & C. 420; *R. v. Johnson*, 1 Moo. C. C. 173; *R. v. Jeyes*, 3 A. & E. 419, per Littledale, J. See ante, § 1252.

⁵ *R. v. Treasurer of Exeter*, 5 M. & R. 167, per Littledale, J., sed qu.; and see 8 A. & E. 590.

⁶ *R. v. Lewen*, 2 Lew. C. C. 161, per Ld. Denman; *R. v. Rees*, 5 C. & P. 302, per Littledale, J.; *R. v. Taylor*, id. 301, per id.

these have been awarded to him;¹ and the costs of an argument before the Court for Crown Cases Reserved have been allowed.² Expenses have also been allowed to the prosecutor and his witnesses, though the prisoner did not reach the assize town till the grand jury had been discharged;³ though the accused, who had not been apprehended, and was under no recognizance, did not appear to take his trial:⁴ though the prisoner had been apprehended under a bench warrant, and the prosecutor and his witnesses were under no recognizances, and only one of them had been subpoenaed;⁵ and though the accused was not forthcoming, having been, through some mistake, discharged by proclamation at a preceding sessions.⁶ In this last case, the witnesses had been bound over to appear, and a true bill had been actually found.⁷

§ 1257. In August, 1851, the Secretary of State for the Home Department was authorised to make regulations with respect to the amount of costs to be allowed to prosecutors and their witnesses in the criminal cases above stated;⁸ but in the ordinary spirit of official procrastination, the rules on this subject were not promulgated till the 9th of February, 1858.⁹

¹ In re Mallison, 1 Lew. C. C. 132, per Patteson, J.; Anon. id. 133, per Parke, J.

² R. v. Cluderoy, 3 C. & Kir. 205; R. v. Lewis, Dear. & Bell, 326; 7 Cox, 406, S. C. See ante, § 1253, n. 1.

³ Anon., 1 Lew. C. C. 128, per Hullock, B.

⁴ Flannery's case, 1 Lew. C. C. 133, per Alderson, B.; Anon. id. 134, per Gurney, B.

⁵ R. v. Butterwick, 2 M. & Rob. 196, per Parke, B.

⁶ R. v. Robey, 5 C. & P. 552, per Tauton, J.

⁷ Id.

⁸ 14 & 15 V., c. 55, §§ 4, 5, 6, repealing 7 G. 4, c. 64, § 26.

⁹ The Rules are as Follows:—

“Whereas it is expedient to make regulations as to the rates, and scales of payment according to which costs, expenses, and compensations shall be allowed and ordered to be paid under the Act of 7 G. 4, c. 64, and divers other Acts of Parliament authorising such payments to prosecutors and witnesses, and to persons attending courts in obedience to recognizances or subpoenas in the cases of criminal prosecutions, for their traveling expenses and trouble and loss of time incurred in attending such courts, and also to make regulations as to the rates and scales of payment, according to which certificates may be granted by the examining magistrate or magistrates in respect of the traveling expenses of prosecutors, and witnesses for the prosecution, and other persons, of attending before such magistrate or magistrates, and of compensation for trouble and loss of time therein in the cases aforesaid:

§ 1258. Independent of the Home Office Regulations,—which § 1135

And whereas to the end aforesaid it has become necessary to revoke divers regulations made under § 26 of the said Act, hereinbefore recited: Now I, the Right Honourable Sir George Gray, acting under and in pursuance of the Act of 14 & 15 V., c. 55, do revoke, annul, and make void, all rules and regulations made under the said 26th sect. of the said Act, whereby any costs, expenses, and compensations may be allowed or ordered to be paid to such prosecutors and witnesses, or other persons attending on recognizance or subpoena, for their traveling expenses, trouble, and loss of time in attending before such courts or before such examining magistrate or magistrates, to a larger or greater amount than the allowance hereinafter authorised to be made in that behalf; and I do make, constitute, and appoint the following rules and regulations to be observed by all courts and magistrates, and the officers and clerks of such courts and magistrates, and by all others whom it may concern, as to the rates and scales of payment of such costs, expenses, and compensation: and I do direct that the same shall take effect and be in force in all places where the same may be capable of taking effect; that is to say—

1. I do make, constitute and appoint the following rules and regulations as to the rates and scales of payment according to which such certificates may be granted, by such *examining magistrate* or magistrates in respect of traveling expenses of prosecutor, and witnesses for the prosecution, of attending before such magistrate or magistrates, and of compensation for their trouble and loss of time therein in the cases aforesaid, namely:—

£ s. d.

There may be allowed to prosecutors or witnesses, being *members of the profession of the law of medicine*, if resident in the city, borough, parish, town, or place where the examination is taken, or within a distance not exceeding two miles from such place, for their loss of time and trouble in attending to give professional evidence on such examination, but not otherwise, a sum, in the discretion of the magistrate or magistrates, for each attendance not to exceed 0 10 6

If such prosecutor or witness shall reside elsewhere, then a sum for the same not to exceed 1 1 0

And for mileage, a sum not to exceed 3d. per mile each way.

To prosecutors and witnesses, being *constables* attending the bench of magistrates, where such examination is taken on any police duty, and to constables paid by salary, and attending from a distance not exceeding three miles, there shall be allowed . . . Nil.

Unless the magistrate or magistrates shall certify that there were special reasons for making an allowance, and shall specify such reasons upon his or their certificate, and then a sum not to exceed for each day 0 1 0

To prosecutors and witnesses, being constables paid by salary, and not attending the magistrate or bench of magistrates on any police duty, for the trouble in attending such examination, from a distance greater than three miles, and not exceeding seven miles from the place where the examination is taken, a sum not to exceed for each day 0 1 0

are cited below, and which, it must be admitted, are more remark-

	£	s.	d.
To the same, if attending from a distance greater than seven miles from the place where the examination is taken, a sum not to exceed for each day	0	1	6
To prosecutors and witnesses, being constables paid by salary, if necessarily detained all night for the purposes of the examination, a sum for the night, not to exceed	0	2	0
The said allowances to prosecutors and witnesses, being constables paid by salary, are to be conditional upon the same being applicable for their personal benefit.			
To prosecutors and witnesses, being constables necessarily travelling to the place of examination in discharge of any police duty, there shall be allowed for mileage	Nil.		
Unless the examining magistrate or magistrates shall certify that there were special reasons for making an allowance, and shall specify the same upon their certificates, and then the same as other constables.			
To prosecutors and witnesses, being constables not attending the place of examination in discharge of a police duty, and entitled to be conveyed under 7 & 8 V., c. 85, § 12, and able to travel by railway, there shall be allowed mileage as follows—			
To superintendents, inspectors, serjeants, and constables, the lowest amount per mile authorised by Act of Parliament for their conveyance, and no larger sum;			
To prosecutors and witnesses, being constables able but not so entitled to travel, and not attending the place of examination on any police duty, there shall be allowed for mileage railway fare the same as to ordinary witnesses;			
To prosecutors and witnesses, being constables not able to travel by railway, and not attending the magistrate or magistrates on any police duty, for every mile beyond four miles each way they shall travel to reach the place of examination, a sum not to exceed each way, 2d.;			
To prosecutors and witnesses, being constables able partially to travel by railway, for every mile after the first four miles each way, in reaching such means of conveyance, a sum not to exceed 2d., and railway fare as other constables.			
To prosecutors and witnesses, not hereinbefore provided for, resident in the city, borough, parish, town, or place where the examination is taken, or within a distance not exceeding two miles from such place, for their trouble and loss of time in so attending, there shall be allowed a sum for each day not to exceed	0	1	0
If resident elsewhere and beyond the distance of two miles, or if such prosecutors or witnesses shall be necessarily detained from home, for the purpose of the examination, more than four hours, a sum, at the like discretion, not to exceed	0	1	6
If they shall be necessarily detained from home more than six hours, then a sum, at the like discretion, not to exceed	0	2	6

able for their elaborate minuteness than for their liberality or en-

£ s. d.

When he or they shall reside at such a distance from the place of examination as to render it necessary that he or they shall sleep from home, then, at the like discretion, a sum for the night not to exceed

0 2 6

There may be allowed for mileage as follows:—

If the prosecutor or witness reside at a greater distance than two miles from the place of examination, and the whole or any portion of the journey can be performed by railway, second-class fare for such whole or portion of the journey, as the case may be, and for a journey, or part of a journey, performed otherwise than by railway, a sum not to exceed per mile each way

0 0 3

In pursuance of the power in me vested, I do make the following rules and regulations as to the rates and scales of payment of costs, expenses, and compensations to be allowed, or ordered to be paid, under the said Act of 7 G. 4, c. 64, and other the Acts of Parliament aforesaid, to prosecutors and witnesses attending *courts of assize, oyer and terminer, gaol delivery, general session of the peace*, or any other courts having power to allow such costs, expenses, and compensations to prosecutors and witnesses, and persons attending such courts, in obedience to any recognizance or subpoena in cases of criminal prosecutions, for their trouble, loss of time, and travelling expenses in so attending.

For the purposes aforesaid I do make, constitute and appoint the following rules and regulations; that is to say, there may be allowed:—

£ s. d.

To prosecutors and witnesses, being *members of the profession of the law or of medicine*, attending to give professional evidence, but not otherwise, for their trouble, expenses, and loss of time, for each day they shall necessarily attend the court to give professional evidence, a sum not to exceed

1 1 0

For each night, the same as ordinary witnesses, and for mileage a sum not to exceed per mile each way

0 0 3

To prosecutors and witnesses, being *constables* and paid by salary, if resident in the city, borough, town, or place where such court is held, or within a distance not exceeding two miles of such place, a sum in the discretion of the court, not to exceed for each day

0 1 0

If resident elsewhere, and if they shall attend from a greater distance than two miles, a sum, in the discretion of the court, for each day not to exceed

0 1 6

To the same, if they shall be necessarily detained all night for the purposes of the prosecution, a further sum for the night not to exceed

0 2 0

If such prosecutors and witnesses shall be chief constables or superintendents attending from a distance greater than three miles, and they shall be necessarily detained all night for the purposes of the prosecution, instead of the foregoing allowances there may be allowed to them the same as ordinary witnesses.

lightened policy—in some grave cases of felony,¹ as, for instance,

¹ 14 & 15 V., c. 55, § 7, provides that “nothing in this Act or in any regulations under this Act, shall interfere with or affect the power of any court to order payment to any person who may appear to such court to have shown extraordinary courage, diligence, or exertion, in, or towards any such apprehension as hereinbefore mentioned, of such sum as such court shall think reasonable, and adjudge to be paid, in respect of such extraordinary courage, diligence, or exertion.”

£ s. d.

The said allowances to prosecutors and witnesses, being constables paid by salary, are to be conditional on the same being applicable to their personal benefit.

To prosecutors and witnesses being constables who shall be entitled to be conveyed under the 7 & 8 V., c. 85, § 12, and able to travel by railway, there may be allowed for mileage as follows :—

To superintendents, inspectors, serjeants, and police constables, the lowest amount per mile authorised by Act of Parliament for their conveyance, and no larger sum ;

To prosecutors and witnesses, being constables not so entitled to travel, there may be allowed railway fare the same as to ordinary witnesses ;

To the same, if paid by salary, and where they are not able to travel by railway, for every mile beyond four miles, each way they shall travel to and return from the court where the prosecution takes place, a sum not to exceed 2d. ;

To the same, if paid by salary, when able partially to travel by railway, for every mile after the first four miles, each way in reaching such means of conveyance, a sum not to exceed 2d., and railway fare as other constables.

To prosecutors and witnesses, not hereinbefore provided for, there may be allowed, for their expenses, trouble, and loss of time in attending the court where the prosecution takes place, per day, a sum not to exceed 0 3 6

To the same, if entitled to mileage, for each night they may be necessarily detained from home for the purpose of the prosecution at any assizes, session of goal delivery, or session of oyer and terminer, a sum not to exceed 0 2 6

To the same for each night they may necessarily be detained from home for the purposes of the prosecution at the session of the peace 0 2 0

To the same for mileage there may be allowed as follows ;

If resident more than two miles from the court where the prosecution takes place, if the whole or any portion of the journey can be performed by railway, second-class fare for such whole or portion of the journey, as the case may be, and for a journey, or part of a journey, performed otherwise than by railway, per mile, each way, a sum not to exceed 0 0 3

where persons are charged, either as principals, or as accessories

In computing the amount to be allowed for mileage under any of the regulations herein contained, I do direct that no greater allowance be made than at the rate of 3*d.* per mile each way by the nearest available route.

I also direct that no prosecutor or witness allowed for mileage under any of the regulations herein contained, shall be allowed for loss of time occasioned by his or her omission to avail himself or herself of a public conveyance, if available.

I further direct that no prosecutor or witness be allowed, under any of the regulations aforesaid, for his attendance, loss of time, trouble or expenses in *more than one case* on the same day.

I further direct that no constable paid by salary be allowed for railway fare not actually paid.

EXCEPTIONS.

I do authorise payment to the officer of a gaol, whose duties require his attendance in the court where the prosecution takes place, for giving evidence on a former conviction, a sum not to exceed 3*s.* 6*d.*

I do make the following regulations as to the compensation to be allowed in the cases of prisoners brought by writ of *habeas corpus*, or other lawful process, to give evidence for the prosecution.

To *governors* and *officers of gaols*, in whose custody the prisoner is brought, as follows :—

	£	s.	d.
To a governor, for his loss of time, trouble, and expenses, in bringing up such prisoner, for each day he may attend, the sum of	0	12	0
To other officers, for the same, the sum of	0	6	0
And for mileage, a sum in the discretion of the court, not to exceed per mile each way	0	1	0

Provided always, that the above allowances shall not be made to any gaoler or officer charged with the custody of prisoners for trial, at the place where such prisoners shall be required to give evidence, in respect of the time such gaoler or officer shall, by virtue of his office, be required to be there present.

I authorise the following payments to be made to *attorneys* for the prosecution, *giving evidence*, over and above the allowances so made to them as attorneys :—

	£	s.	d.
Such attorneys may be allowed a sum not exceeding	0	6	8
if, in the opinion of the proper officer of the court, such evidence was necessary, and saved the attendance of another witness.			

And whereas it may become necessary, in certain cases, that *scientific persons*, unacquainted with the facts to be given in evidence upon the prosecution, may be required to attend as witnesses, in order to state their opinion on matters of science in issue on such prosecutions, and it is reasonable that in such cases the foregoing rates of allowance should be departed from, I hereby direct that the allowances to be made to such persons shall be subject to the decision of the court before whom such persons may be examined, which may direct such allowances as to such court may appear reasonable.

before the fact, with any of the following crimes :—viz.: murder;¹

Whenever an *interpreter* shall be employed to interpret, on the part of the prosecution, it shall be competent for the court before whom such interpreter shall be so employed to make him such allowances as to such court shall seem reasonable; provided always, that this regulation is not to interfere with any regulations in force, where such now exist, for the remuneration of interpreters.

In case of the *illness* or inability of any prosecutor or witness to travel without some special means of conveyance, it shall be lawful for the court to depart from the foregoing rates of allowances, and to make such other allowances as the justice of the case shall require.

Under the circumstances herein specified under the head of exceptions, I authorise a departure from the rules and regulations herein contained, as well by the examining magistrate or magistrates as by the courts herein mentioned, except only in the case of an attorney for the prosecution giving evidence: provided always, that whenever any allowances hereinbefore authorised under the head of exceptions, shall have been made, the circumstances under which the general rate of allowances shall be departed from, shall in all cases be fully specified by the proper officer of the court, or magistrate, upon the document by which such allowances shall be authorised. And lastly, I do order that, notwithstanding anything herein contained, all lawful rules and regulations heretofore made and in force, under or by reason whereof allowances to a *less* amount than those hereby authorised are now payable in the cases hereinbefore provided for, shall be and remain in as full force and effect as if this order had not been made, and shall continue to apply to the persons and the circumstances thereby provided for, although such persons and circumstances may be comprehended within the terms hereof, and that the said rules and regulations shall so far remain unaffected by this order, and that nothing herein contained shall have the effect of increasing the amount of any rates or allowances which may be lawfully made under such rules and regulations; it being the true intent and meaning hereof that such rules and regulations shall be and remain unaltered, further or otherwise than in the reduction of allowances to prosecutors and witnesses where the rates thereof shall be in excess of those herein contained.

Given under my hand at Whitehall, the 9th of February, 1858.

(Signed) G. Grey."

¹ 7 G. 4, c. 64, § 28, enacts, that, "where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with *murder or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at, any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen*, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any

attempting to murder;¹ stabbing, cutting, or poisoning;² shooting at any one, or attempting to discharge loaded fire-arms at him;³ administering anything to a woman to procure her miscarriage;⁴ rape;⁵ housebreaking;⁶ robbery;⁷ arson;⁸ horse-stealing,⁹ bullock-stealing,¹⁰ or sheep-stealing;¹¹ and receiving stolen property knowing it to have been stolen;¹²—the courts, whether of oyer and terminer and gaol delivery, or of sessions of the peace,¹³ are empowered to give to any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party, charged with *receiving stolen property* knowing the same to have been stolen, such court shall have the power to order compensation to such person in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are, by this Act empowered to allow to prosecutors and witnesses respectively.” § 29 provides that the sheriff shall pay the amount awarded, and shall be repaid by her Majesty’s treasury; and § 30 enacts, that if any man shall be killed in endeavouring to apprehend any person charged with any of the offences mentioned in § 28, the court may order the sheriff to pay to his widow, child, father, or mother, such sum as in its discretion shall seem meet.

¹ This offence, though not mentioned in the statute, has been held to be within the spirit of the enactment, and extra expenses incurred in apprehending a prisoner, who was charged with attempting to murder by suffocation, have been allowed, *R. v. Durkin*, 2 Lew. C. C. 163, per Patteson, J.

² 7 G. 4, 64, § 28, cited in last note but one.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* This term, it seems, does not include the crime of sacrilege, *R. v. Robinson*, 1 Lew. C. C. 129, per Hullock, Bolland, and Parke, Bs.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* This word describes a class of offences, and includes the crime of stealing cows, heifers, &c., *R. v. Gillbrass*, 7 C. & P. 444.

¹¹ *Id.*

¹² *Id.* See also, 5 G. 4, c. 84, § 22, which provides, that whoever shall discover and prosecute to conviction any offender, being unduly at large within the kingdom before the expiration of his sentence of transportation or banishment “shall be entitled to a reward of 20*l.* for every such offender so convicted;” and, though no provision is made in the Act for the mode of recovering the reward, the judges have held that the presiding judge at the trial has power to make an order for its payment on the county treasurer, *R. v. Emmons*, 2 M. & Rob. 279; *R. v. Ambury*, 6 Cox, 79, per Williams, J. See the Irish Acts of 6 & 7 W. 4, c. 116, §§ 106, 107; and 7 & 8 V., c. 106, §§ 41, 42.

¹³ 14 & 15 V., c. 55, § 8, enacts, that, “when any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned”

powered to order that any persons who have been especially active in apprehending the offenders, shall be paid some additional remuneration for their expenses,¹ exertions,² and loss of time.

§ 1259. In 1866 a temporary Act was passed, which will continue in force till the 31st of December, 1884,³ and which empowers magistrates, on all charges of felony “bonâ fide made upon reasonable and probable cause,” or on a charge of any misdemeanor enumerated either in § 23 of 7 G. 4, c. 64,⁴ or in § 2 of 14 & 15 V., c. 55,⁵ “bonâ fide preferred,” to grant to prosecutors and witnesses certificates of their expenses, and of their allowances for trouble and loss of time, although they may not be bound over by recognizance or subpœna to prosecute or give evidence, and although no committal for trial may take place.⁶ The Court of Quarter Sessions is then empowered to allow the amount named in any such certificate, and to sign an order for payment.⁷ Again, the Summary Jurisdiction Act, 1879,⁸ which empowers justices in petty sessions to dispose of many indictable offences in a summary way, provides, in § 28, that, subject to the Home Office regulations, such justices may, if they think fit, order payment of the expenses of the prosecutors and witnesses.

(that is, in § 28 of 7 G. 4, c. 64), “which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned; provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation, be made out and delivered by the proper officer of the court unto such person without fee or payment for the same.”

¹ The judge has no power, as it seems, to order the payment of expenses incurred in apprehending a prisoner out of England, *R. v. Barrett*, 6 Cox, 78, per Williams, J. The Secretary of State must, in such cases, be memorialised; *id.*

² Under this word, a gratuity may be awarded to a prosecutor, for his courage in apprehending the prisoner, *R. v. Womersly*, 2 Lew. C. C. 162, per Parke, B.; though he has not been put to any expense, *R. v. Barnes*, 7 C. & P. 166. If the facts do not appear in evidence, the judge will require them to be laid before him on affidavit, *R. v. Jones*, *id.* 167, per Park, J.

³ 29 & 30 V., c. 52; continued by 46 & 47 V., c. 40.

⁴ Ante, p. 1062, n. 1.

⁵ Ante, p. 1063, n. 10.

⁶ 29 & 30 V., c. 52, § 1, continued by 46 & 47 V., c. 40.

⁷ § 2.

⁸ 42 & 43 V., c. 49.

§ 1260. In all criminal cases, the prisoner is entitled, both in this country and America, to have compulsory process for obtaining witnesses in his favour;¹ and now, by virtue of a philanthropic Act, which, in 1867, the Legislature was induced to pass at the instance of Mr. Russell Gurney, the court, before which any accused person is tried either for felony or misdemeanor, may order that any of his witnesses, who shall appear on recognizance, shall be paid such sum as will compensate them for the expenses, trouble, and loss of time they may have incurred in attending either before the magistrate or before the court.² The same statute enacts, that with respect to certain misdemeanors,³ which occasionally form the

¹ 2 Hawk. P. C. c. 46, §§ 170, 172; 2 Ph. Ev. 378; 2 Russ. C. & M. 947; Const. U. S. Amendm. Art. 6. See 30 & 31 V., c. 35, §§ 3 & 4, extending the operation of 11 & 12 V., c. 42, §§ 16, 20.

² 30 & 31 V., c. 35, § 5, enacts, that, "the court before which any accused person shall be prosecuted or tried, or for trial before which he may be committed or bailed to appear for any felony or misdemeanor, is hereby authorised and empowered, in its discretion, at the request of any person who shall appear before such court on recognizance to give evidence on behalf of the person accused, to order payment unto such witness so appearing such sum of money as to the court shall seem reasonable and sufficient to compensate such witness for the expenses, trouble, and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court; and the amount of such expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of *sixpence* for each witness, [but now, as to this fee, see 32 & 33 V., c. 89, §§ 10, 11,] make out and deliver to the person entitled thereto an order for such expenses and compensation, together with the said fee of *sixpence*, upon such and the same treasurers and officers as would now by law be liable to payment of an order for the expenses of the prosecutor or witnesses against such accused person; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, then upon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough, or place where the offence of such accused person may be alleged to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts: Provided always, that in no case shall any such allowances or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution; and provided always, that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution."

³ Viz.: perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling or disorderly house, and any indecent assault.

subject of vexatious indictments, the court, in the event of the accused being acquitted, may, under certain circumstances, order his costs, and the costs of his witnesses, to be defrayed by the prosecutor.¹ A similar law prevails also with respect to all misdemeanors under the English Debtors' Act, 1869,² the Bankruptcy Act, 1883,³ the Irish Debtors' Act 1872,⁴ the Corrupt Practices Prevention Act, 1854,⁵ and probably, the Municipal Corporations Act, 1882, Part IV.,⁶ and the Newspaper Libel and Registration Act, 1881.⁷ Independent of these enactments,—which happily afford a remedy for what used to be a flagrant defect in our penal laws,—the court occasionally will interfere on behalf of prisoners, and will, for the purposes of defence, direct constables to restore to them any property which may have been taken from them, provided only that it be not required as an instrument of proof at the trial, and that it do not fairly appear to be the produce of the crime with which they stand charged.⁸

¹ 30 & 31 V., c. 35, § 2, enacts, that, “wherever any bill of indictment shall be preferred to any grand jury, under the provisions of 22 & 23 V., c. 17. (for any offence named in the last preceeding note) against any person who has not been committed to or detained in custody, or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor, or other person by or at whose instance such indictment shall have been preferred, shall pay unto the accused person the just and reasonable costs, charges, and expenses of such accused person and his witnesses (if any) caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court; and upon non-payment of such costs, charges, and expenses within one calendar month after the date of such direction and order, it shall be lawful for any” [Division of the High Court,] “or any judge thereof, or for the justices and judges of the Central Criminal Court (if the bill of indictment has been preferred in that court), to issue against the person on whom such order is made such and the like writ or writs, process or processés, as may now be lawfully issued by any of the said superior courts for enforcing judgments thereof.”

² 32 & 33 V., c. 62, § 18.

³ 46 & 47 V., c. 52, 149, subs. 2.

⁴ 35 & 36 V., c. 57, § 18, Ir.

⁵ 17 & 18 V., c. 102, § 12; continued by 46 & 47 V., c. 51, § 70, Sch. 3, till 31st Dec. 1884; and by 47 & 48 V., c. 53, § 2, till Dec. 31st, 1885.

⁶ See 45 & 46 V., c. 50, § 78, now repealed by 47 & 48 V., c. 70, § 38, but substantially reenacted by § 30 of that Act.

⁷ 44 & 45 V., c. 60, § 6.

⁸ *R. v. Barnett*, 3 C. & P. 600; *R. v. Jones*, 6 id. 343; *R. v. O'Donnell*, 7 id. 138; *R. v. Kinsey*, id. 447; *R. v. Burgis*, id. 488; *R. v. Rooney*, id. 515; *R. v. Frost*, 9 id. 131.

§ 1261. As writs of subpœna have no force beyond the jurisdictional limits of the court from which they issue, it is obvious that, in order to secure the due administration of justice, additional powers were required to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part. The aid of the Legislature was therefore invoked in the year 1805, and an Act¹ was passed supplying a partial remedy for the evil, that is, a remedy which only extended to criminal prosecutions. This statute provides in substance, that the service of a subpœna or other process upon any person in one part of the United Kingdom, requiring his appearance to give evidence in any *criminal prosecution* in another part, shall be as effectual as if the process had been served in that part where the witness is required to appear. If the person served does not appear, the court out of which the process issued may, upon proof of service, transmit a certificate of the default, under the seal of the court, or under the hand of one of the judges, to the Queen's Bench Division of the High Court in England or Ireland, or to the court of Justiciary in Scotland, according as the writ may have been served in one or other of these parts of the kingdom; and such courts respectively, on proof that a reasonable sum was tendered to the witness for his expenses, may punish him for his default, in like manner as if he had refused to appear in obedience to process issuing out of these respective courts. § 1137

§ 1262. 'Matters remained in this state for nearly half a century, when Parliament again interposed, and a further instalment of legal reform was embodied in the Act of 17 & 18 V., c. 34. This statute enacts as follows:—"I. If in any action or suit now or at any time hereafter depending in any of her Majesty's Superior Courts of Common Law at Westminster or Dublin, or the Court of Sessions or Exchequer in Scotland, it shall appear to the court in which such action is pending, or if such court is not sitting, * to any judge of any of the said courts respectively, that it is proper² to compel the § 1138

¹ 45 G. 3, c. 92, §§ 3, 4.

² The affidavit on which the application is founded, must disclose the facts to show that the attendance of the witness is reasonably necessary, *Allen v. D. of Hamilton*, 2 Law Rep., C. P. 630.

* A judge may now act, whether the court be sitting or not, 47 & 48 V., c. 61, § 16.

personal attendance at any trial¹ of any witness, who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of subpoena ad testificandum, or of subpoena duces tecum, or warrant of citation, shall issue in special form commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the court from which it issues. II. Every such writ shall have at the foot thereof a statement or notice that the same is issued by the special order of the court or judge, as the case may be; and no such writ shall issue without such special order. III. In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said court, to transmit a certificate of such default, under the seal of the same court, or under the hand of one of the judges or justices of the same, to any of her Majesty's Superior Courts of Common Law at Westminster, in case such service was had in England, or in case such service was had in Scotland, to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland, to any of her Majesty's Superior Courts of Common Law at Dublin; and the court to which such certificate is so sent, shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpoena or other process issued out of such last-mentioned court. IV. None of the said courts shall in any case proceed against or punish any person, for having made default by not appearing to give evidence in obedience to any

¹ This term will not include the hearing of an action, which "with all matters in difference" has been referred to an arbitrator; *Hall v. Brand*, L. R., 12 Q. B. D. 39; 53 L. J., Q. B. 19, S. C. Quære, will it include the hearing of a claim in chambers, *Power v. Webber*, L. R., 10 Eq. 188; or a reference before a master; *O'Flanagan v. Geoghegan*, 16 Com. B., N. S. 636? See *Hall v. Brand*, *suprà*, and see post, § 1308, n. 1.

writ of subpœna or other process issued under the powers given by this Act, unless it shall be made to appear to such court, that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or process was served upon such person. V. Nothing herein contained shall alter or affect the power of any of such courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission. VI. Nothing herein contained shall alter or affect the admissibility of any evidence at any trial, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the court, but the admissibility of all such evidence shall be determined as if this Act had not passed."

§ 1263. The salutary powers just cited, though originally confined to the Courts of Common Law, have now been extended to all the Divisions of the High Courts, whether for England or Ireland, and their respective judges;¹ and it would be difficult to find a satisfactory reason for not conferring them also on all other important Tribunals.² In the United States, courts sitting in any district are empowered by statute to send subpœnas for witnesses into any other district, provided that, in civil causes, the witness do not live at a greater distance than one hundred miles from the place of trial.³ § 1139

§ 1264. Another manifest improvement in the administration of justice which is much called for, is to empower all inferior courts of record to issue subpœnas into any part of England. At present, such courts, though authorised to issue subpœnas, can only in general⁴ do so within their own jurisdiction. Subpœnas, therefore, which are granted by the clerk of assize or clerk of the peace are § 1140

¹ See 36 & 37 V., c. 66, 16; 40 & 41 V., c. 57, § 21, Ir.

² In the counties bordering on Scotland, the want of such a power as is stated in the text is much felt in the Cy. Cts.

³ Stat. 1793, ch. 66 [22,] § 6; 1 L. L., U. S. p. 312, Story's ed.

⁴ See post, § 1305, as to the Cy. Cts.

not compulsory except within a single county or other more limited district; and the consequence is, that if a necessary but unwilling witness happens to live, as he often does, beyond these limits, application must be made, at the cost of much time and trouble, to the Central Office of the Supreme Court, whence subpœnas may issue to any place within the jurisdiction of the Supreme Court.¹

§ 1265.² If a witness, having been duly served with a subpœna, § 1141 wilfully neglects to appear, he is guilty of *contempt* of court, and may be proceeded against by *attachment*. In order to render a witness liable to this summary proceeding, it is requisite to show distinctly, though by any species of proof, that, on the cause being called on for trial, he was wilfully absent under such circumstances, that, had the trial proceeded, he would not have been forthcoming when required to give evidence. The jury need not be sworn; and it is no longer necessary even that the witness should be called upon his subpœna before withdrawing the record. This last form is, indeed, usually followed, and the practice is convenient, as furnishing satisfactory and cheap evidence of the absence of the witness. Still, it is not essential; and in some cases, as if the witness had left England two days before the trial, it would be merely an idle ceremony.³

§ 1266.⁴ As an attachment for contempt does not proceed upon § 1142 the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the court,⁵ the case must be perfectly clear to justify the exercise of this extraordinary jurisdiction.⁶ The motion for an attachment should therefore be

¹ Corner, Cr. Pr. 256, 257; Crown Cir. Comp. 9, 21; 42 & 43 V., c. 78, § 5. See post, § 1268.

² Gr. Ev. § 319, in some part.

³ Lamont v. Crook, 6 M. & W. 615; Barrow v. Humphreys, 3 B. & A. 598; Dixon v. Lee, 1 C. M. & R. 645; Mullett v. Hunt, 1 C. & M. 752; Goff v. Mills, 2 Dowl. & L. 23, per Wightman, J. These cases overrule Malcolm v. Ray, 3 Moore, 222, and Bland v. Swafford, Pea. R. 60; and resolve the doubt expressed in R. v. Stretch, 4 Dowl. 30; 3 A. & E. 503, S. C. See Cast v. Poyser, 3 Sm. & Giff. 369.

⁴ Gr. Ev. § 319, in part.

⁵ Barrow v. Humphreys, 8 B. & A. 600, per Best, J.

⁶ Horne v. Smith, 6 Taunt. 10, 11; Garden v. Cresswell, 2 M. & W. 319; Scholes v. Hilton, 10 M. & W. 15; 2 Dowl. N. S. 229, S. C.; R. v. Lord J. Russell, 7 Dowl. 793.

brought forward as soon as possible,¹ and the party applying must show by affidavit that a copy of the subpœna was personally and in due time served on the witness,² that when such service was effected, the original writ was shown to him,³ that his fees, if he were entitled to them, were paid or tendered,⁴ or the tender expressly waived,⁵ and, in short, that everything has been done which was necessary to secure his attendance.⁶ It must also appear from the affidavits, that the absence of the witness was an intentional defiance of the process of the court;⁷ but if this be clearly shown, the witness, as it seems, cannot justify his conduct by proving that his evidence was immaterial.⁸

§ 1267. The fact, however, of immateriality is sometimes im- § 1143
portant, as tending to negative the existence of wilful misconduct. Thus, the court refused to grant an attachment against Lord Brougham, when it was evident, from the notes of the judge who tried the cause, that his presence at the trial would not have served the complainant,⁹ and they probably observed, that they would not allow the process of the court to be used for purposes of needless vexation. So, in the case of Lord John Russell and Mr. Fox Maule, who had disobeyed writs of subpœna duces tecum, the court, in discharging a rule for an attachment, relied on the fact that the documents, if produced, would not have been admissible.¹⁰

¹ *R. v. Stretch*, 4 Dowl. 30; 3 A. & E. 503, S. C.

² Ante, §§ 1242—1244.

³ *Garden v. Cresswell*, 2 M. & W. 319; 5 Dowl. 461, S. C.; *Jacob v. Hungate*, 3 Dowl. 456; *R. v. Sloman*, 1 Dowl. 618; *Smith v. Truscott*, 1 Dowl. & L. 530; 6 M. & Gr. 267, S. C.; *Marshall v. York, Newcastle, & Berw. Ry. Co.*, 11 Com. B. 398.

⁴ Ante, § 1246; *Connor v. —*, Ir. Cir. R. 610, per Pennefather, B.; *Brocas v. Lloyd*, 23 Beav. 129; 26 L. J., Ch. 758, S. C.

⁵ *Goff v. Mills*, 2 Dowl. & L. 23, per Wightman, J.

⁶ 2 Ph. Ev. 377; *Garden v. Cresswell*, 2 M. & W. 319; 5 Dowl. 461, S. C. See *Hempston v. Humphreys*, 1 R., 1 C. L. 271.

⁷ *Scholes v. Hilton*, 10 M. & W. 15; 2 Dowl. N. S. 229, S. C.; *Netherwood v. Wilkinson*, 17 Com. B. 226.

⁸ *Chapman v. Davis*, 3 M. & Gr. 609, 611, 612; 4 Scott, N. R. 319; 1 Dowl. N. S. 239, S. C.; *Scholes v. Hilton*, 10 M. & W. 16; 2 Dowl. N. S. 230, S. C. These cases appear to overrule *Tinley v. Porter*, 5 Dowl. 744, and *Taylor v. Williams*, 4 M. & P. 59.

⁹ *Dicas v. Lawson*, 1 C. M. & R. 934,

¹⁰ 7 Dowl. 693.

In *R. v. Sloman*, the rule for attachment was refused, the witness having had reasonable ground for believing that he would not be wanted at the trial.¹ On the other hand, it must be remembered that the duty of attending a court of justice in pursuance of a subpœna is paramount to the duty of obedience to the commands of any master, however stringent and express those commands may be;² and, on this ground, an attachment has issued against a solicitor, who, being served with a subpœna to attend a trial on the following day, went in the morning to a board of guardians to discharge his duty as clerk, and found on his return that the cause had been unexpectedly called on in his absence. The court held, that he had no right to speculate on the chance of being in time.³ Of course, if the witness be too ill to attend,⁴ or if leave of absence has been given him by the solicitor of the party requiring his attendance,⁵ no attachment will lie; and, on ordinary principles of justice, it would seem that if in a criminal case, where no fees were tendered, a witness from real poverty should be unable to obey the summons, he would not be guilty of contempt.⁶

§ 1268. Although the High Court will grant an attachment § 1144
against a witness for disobeying a Central Office⁷ subpœna to give evidence in an inferior court,⁸ provided that distinct proof be given by affidavit that the inferior court had jurisdiction to examine the witness,⁹ it has no power, either at common law, or by virtue of the Act of 45 G. 3, c. 92,¹⁰ to interfere, unless the writ has issued from the Central Office;¹¹ and, consequently, in all those cases where process is granted by the clerk of assize, or clerk of peace, and the witness disobeys the summons, the inferior court is driven to

¹ 1 Dowl. 618.

² *Goff v. Mills*, 2 Dowl. & L. 23, 28, per Wightman, J.

³ *Jackson v. Seager*, 2 Dowl. & L. 13, per Wightman, J.

⁴ *In re Jacobs*, 1 Har. & W. 123. See *Scholes v. Hilton*, 10 M. & W. 15.

⁵ *Farrah v. Keat*, 6 Dowl. 470.

⁶ 2 Ph. Ev. 383.

⁷ These subpœnas used to be issued by the Crown Office, but that office is now a department of the Central Office, 42 & 43 V., c. 78, § 5. Rules of Sup. Ct., 1883, Ord. LXI., R. 1.

⁸ *R. v. Ring*, 8 T. R. 585; *R. v. Greenaway*, 7 Q. B. 126.

⁹ *R. v. Vickery*, 12 Q. B. 478.

¹⁰ As to which Act, see ante, § 1261.

¹¹ *R. v. Brownell*, 1 A. & E. 598.

proceed against him, either by the doubtful and arbitrary course of fining him in his absence for contempt,¹ or by the tedious, and therefore useless, process of indictment. It may be said, that those who wish to have the attendance of witnesses enforced by the authority of the High Court may always effect this purpose by obtaining a subpœna from the Crown Department of the Central Office; but in remote counties this course is highly inconvenient, as it occasions a considerable loss of time, and, if a town agent be employed, a needless additional expense. A much more simple and effectual method might be adopted, if the Legislature would enact, that every inferior court should, like the Central Office, have the power of issuing subpœnas for witnesses, in whatever part of the country they might reside, and that the high court should enforce obedience to such subpœnas by the ordinary process of attachment.² The wholesome dread of this proceeding would, on the one hand, render it seldom necessary to have recourse to it; and the necessity for paying the expenses of the witnesses would, on the other, render parties unwilling to summon persons whose presence was not materially requisite. It is only reasonable and just, that every court, having power definitely to determine any suit, should be enabled, without being driven to a circuitous mode of proceeding, to call for all adequate proofs of the facts in controversy, and, to that end, to compel the attendance of witnesses.

§ 1269. Though a flagrant case of palpable contempt be shown, § 1145 such as an express and positive refusal to attend, the Court will not grant an attachment in the first instance; but the uniform practice which now prevails is to obtain the leave of the court or a judge, "to be applied for on notice to the party against whom the attachment is to be issued."³ It is hardly necessary to add, that if a witness duly served, and having his expenses paid, refuses in

¹ See *R. v. Clement*. 4 B. & A. 218. In that case the fine was imposed by one of the superior judges. Qu. whether the justices at sessions could safely exercise the like power.

² Ante, § 1264.

³ Rules of Sup. Ct., 1883, Ord. XLIV., R. 2. Service of notice on the party's solicitors, or at his place of residence, is sufficient, without personal service on the party himself, *Browning v. Sabin*, 46 L. Ch. 728, per Jessel, M.R.; *In re a Solicitor*, L. R., 14 Ch. D. 152, per Id. A judge at Chambers may order the writ to issue. *Salm-Kyrburg v. Pomansky*, 53 L. J., Q. B. 428; L. R., 13 Q. B. D. 218. S. C. nom. *Salm Kyrburg v. Posnanski*.

court to be sworn or to testify, he is guilty of contempt, and may, as in all cases of contempt, be punished by fine and imprisonment at the discretion of the court.¹

§ 1270. Besides the mode of proceeding by attachment, the party injured in a civil suit by the non-attendance of a witness has his remedy, either by an "*action of debt*" under § 12 of the statute 5 El., c. 9,² or by an action for damages at common law. Recourse is seldom had to the action of debt, because, although the party aggrieved may recover thereby a penalty of 10*l.*, in addition to what the court might assess as a satisfaction in damages, yet this assessment must be made, not by the jury or judge at Nisi Prius, but by the court out of which the process issued; and, this being an inconvenient course, it is more advisable to rely on the remedy by attachment, where if the witness redeems his offence by making satisfaction to the party, the court will generally remit the punishment.³ § 1146

§ 1271. The action for damages is more frequent, and to support this action it is not necessary, any more than in proceeding by attachment, to show that the jury were sworn, or that the witness was called upon his subpœna;⁴ neither is it requisite that the statement of claim should contain a direct and positive averment that the party had a good cause of action or a good defence, but it will suffice to state and prove, that the witness was material, that the trial could not safely proceed without him, and that, in point of fact, the party has sustained some damage by the absence of the witness.⁵ It is true, that if *only one issue* has been joined in an action, the plaintiff cannot practically proceed against a witness for having disobeyed his subpœna, unless he has had a good cause of action as against the original defendant; because, in order to § 1147

¹ 4 Bl. Com. 284—288.

² Cited ante, § 1246.

³ Pearson v. Isles, 2 Doug. 556, 560, 561, per Ld. Mansfield.

⁴ Lamont v. Crook, 6 M. & W. 625. See ante, § 1265.

⁵ Mullett v. Hunt, 1 C. & M. 752; Davis v. Lovell, 4 M. & W. 678; Couling v. Cox, 6 Com. B. 703; 6 Dowl. & L. 399, S. C. See Yeatman v. Dempsey, 7 Com. B., N. S. 628; 9 Com. B., N. S. 881, S. C. in Ex. Ch.; Needham v. Fraser, 1 Com. B. 815.

recover damages from the witness, he must show that he has sustained some loss through his default, and this he can scarcely do without having had himself good grounds for commencing the former suit.¹ This reason, however, does not apply, where *several issues* have been joined in the original action; for, in such a case, it may well happen that the plaintiff, though he had no cause of action, may have sustained damage in respect of the *costs* of some of the issues, on which, although failing generally in his suit, he might have succeeded by the testimony of the witness, had he duly attended the trial.² In this last class of cases, therefore, the traverse of an averment of a good cause of action would simply raise an immaterial issue.³ It seems that the same strictness of proof with respect to the form and service of the writ, which is necessary to render the witness guilty of contempt, will not be requisite in order to sustain the action;⁴ and it has been held, that, although for the purpose of bringing the witness into contempt the original writ must be shown at the time when the copy is served, this course is not necessary as the foundation of an action, unless, perhaps, when a sight of the writ has been expressly demanded by the witness.⁵

§ 1272. When the *witness is in custody*, the writ of subpœna is of no avail, and the party requiring his evidence must either apply for a *habeas corpus ad testificandum*,⁶ or obtain a warrant or order under the hand of one of the judges of the High Court.⁷ The granting of the writ of habeas corpus is in several cases regulated by statute. Thus, the Act of 43 G. 3, c. 140, provides, that any judge of the [High Court] may, at his discretion, award a writ of habeas corpus for bringing any prisoner, detained in a gaol or prison in England, before any court-martial, any commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant, for trial, or to be examined touching any matter depending before such court-martial or commissioners;

§ 1148

¹ *Couling v. Coxe*, 6 Com. B. 718, 719, per Wilde, C. J.

² *Id.* 703, 719, 720.

³ *Id.*

⁴ *Davis v. Lovell*, 4 M. & W. 684, 686, per Parke, B.

⁵ *Mullett v. Hunt*, 1 C. & M. 758, per Bayley, B.

⁶ See Rules of Sup. Ct. 1883, App. J, Form 2.

⁷ See § 1276, post.

and the statute 44 G. 3, c. 102, enacts, that a judge of the Supreme Court in England or in Ireland may, at his discretion, grant a habeas corpus to bring up *any prisoner*, detained in a gaol or prison, before *any Court of Record*, to be there examined as a witness, and to testify the truth before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal, depending, or to be inquired into or determined, in any such court. Again, the Acts of 1 W. 4, c. 22, and 3 & 4 V., c. 105, which respectively relate to England and Ireland, and were passed to enable witnesses to be examined by commissioners in certain cases, before the trial of the cause in which their testimony would be required, enact,—the first, in § 6, the second in § 71,—that “it shall be lawful for any sheriff, gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of that Act, by virtue of a writ of habeas corpus to be issued for that purpose, which writ shall and may be issued by any court or judge under such circumstances, and in such manner, as such court or judge may now by law issue the writ commonly called a writ of habeas corpus ad testificandum.”

§ 1273. The application for a writ under either of the two first-mentioned statutes, if not under the last two, must be made to a judge at chambers,¹ on an affidavit, stating the place and cause of confinement of the witness, and further that his evidence is material, and that the party cannot, in his absence, safely proceed to trial;² and if the prisoner be confined at a great distance from the place of trial, the judge will perhaps require that the affidavit should point out in what manner his testimony is material.³ If the witness is to give evidence in a civil suit, it is usual to add in the affidavit that he is willing to attend; but this would seem to be a needless averment, and it is certainly not required in criminal proceedings.⁴ When a party to the record is in custody, he is entitled to the writ for himself as much as for any other witness, provided that his evidence be necessary at the trial.⁵

¹ Gordon's case, 2 M. & Sel. 582; Browne v. Gisborne, 2 Dowl. N. S. 263, per Coleridge, J.

² See the form, Chit. Forms, 60; Corner, Cr. Pr., App. 66.

³ Standard v. Baker, cited Tidd, 858.

⁴ Corner, Cr. Pr. 118.

⁵ Ex p. Cobbett, 4 Jur. N. S. 145, Ex. (3955)

§ 1274. Before the passing of the statute 44 G. 3, c. 102, it was held that neither a *prisoner* in custody for *high treason*,¹ nor a *prisoner of war*,² could be brought up by a habeas corpus ad testificandum; and Lord Mansfield stated, with respect to the prisoner of war, that application should be made to the Secretary of State. The court, however, on the Secretary of State refusing to interfere, granted a rule to show cause why the adverse party should not consent, either to admit the facts, or that the prisoner should be examined on interrogatories; adding, that if this consent should be refused, they would put off the trial from time to time, in order to give the applicant an opportunity of filing a bill in equity. It may now be fairly questioned whether the words of the Act, "*any prisoner detained in any prison*," would not be sufficiently large to warrant the interference of the judge in both these cases; and though considerations of state policy might, perhaps, lead the judges to narrow the interpretation of the statute in the case of prisoners of war, no valid reason can be urged why prisoners charged with high treason should not be placed on the same footing as other prisoners.

§ 1275. Independent of the powers expressly granted to the judges by the Acts above mentioned, the Queen's Bench Division of the High Court would seem, at *common law*,³ to possess the right of awarding writs of habeas corpus ad testificandum in certain cases, though the extent of such authority is not distinctly defined. The Legislature has indirectly recognised the power of the superior judges to bring persons detained in *custody* under civil or criminal process before *magistrates*, or Courts of Record;⁴ and the judges themselves have claimed the right of granting these writs in other analogous cases.⁵ Thus, a writ has been awarded to bring up the

¹ Langston v. Cotton, Pea. Add. Cas. 21.

² Furly v. Newnham, 2 Doug. 419.

³ See R. v. Freind, 13 How. St. Tr. 2, 3; R. v. Burbage, 3 Burr. 1440.

⁴ See preamble of 43 G. 3, c. 140, and Ex. p. Griffiths, 5 B. & A. 730.

⁵ See In re Cook, 7 Q. B. 653, where the court refused to issue a writ of habeas corpus to bring up a prisoner, committed on a charge of murdering A., before a coroner's jury, who were sitting on A.'s body, for the purpose of his being *identified* by the witnesses. In this case, the judges seemed to be of opinion, that they had power to issue such writ in a case of necessity. See, also, Daniel v. Thompson, 15 East, 78; Att.-Gen. v. Fadden, 1 Price, 403.

body of a person confined as a lunatic, for the purpose of giving evidence in a cause, on an affidavit that he was not dangerous, and was in a fit state to be examined.¹ So, a prisoner in civil custody has been brought up by habeas corpus, for the purpose of being examined as a witness before an arbitrator.² So, a habeas corpus has issued from the old Court of Queen's Bench to bring up a prisoner committed by that court for non-payment of a fine, to give evidence before an election committee, on an affidavit that the rule to show cause had been served on the under-sheriff, the Solicitor of the Treasury, the prisoner himself, and the party at whose suit he was in execution, and no cause being shown.³ On a similar application being subsequently made to the court, the only difference being that the prisoner was in custody on a charge of felony, the judges doubted their power, but granted a rule nisi, directing notice to be given to the Attorney-General, the committing magistrate, the person having the custody of the prisoner, and all parties at whose suit he might be detained on civil process.⁴ It became unnecessary to call upon the court to make this rule absolute. Again, if the witness be in the military or naval service, and therefore, not at liberty to attend without the leave of his superior officer, which he cannot obtain, he may be brought into court to testify by a writ of habeas corpus; but, in such case, the Queen's Bench Division of the High Court will refuse to award the writ, unless the affidavit states that the witness has been served with a subpoena, and is willing to attend; for a free man cannot be brought up as a prisoner against his consent.⁵ In all these cases the writ will be directed to the gaoler, sheriff, commanding officer, or other person, in whose custody, or under whose control, the witness is detained, who, on being served with it, and being paid or tendered his reasonable charges, will be bound to produce the witness according to the exigency of the writ.

§ 1276. As Lord Denman's Act,⁶ by rendering convicted pri- § 1152

¹ Fennell v. Tait, 1 C. M. & R. 584.

² Graham v. Glover, 25 L. J., Q. B. 10; 5 E. & B. 591, S. C.; Marsden v. Overbury, 18 Com. B. 34.

³ In re Price, 4 East, 587.

⁴ In re Pilgrim, 3 A. & E. 485; 4 Dowl. 89, S. C. nom. R. v. Pilgrim.

⁵ R. v. Roddam, 2 Cowp. 672.

⁶ 6 & 7 V., c. 85, § 1.

soners competent witnesses, caused applications for writs of habeas corpus to be more frequent than they formerly were, the Legislature, in 1853, thought it convenient to provide, in certain cases, a summary mode of obtaining the attendance of witnesses in *criminal* custody. It has, therefore, been enacted, by § 9 of 16 & 17 V., c. 30, that any secretary of state and any judge of the Superior Courts of Common Law,¹ may, if he think fit, "upon application by affidavit, issue a warrant or order under his hand, for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial or otherwise, (*except* under process in any *civil* action, suit, or proceeding,) before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of habeas corpus awarded by any of her Majesty's Superior Courts of Law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."

§ 1277. Somewhat similar provisions have long been in force in Ireland, under § 2 of the statute 38 G. 3, c. 26, which enacts, that "it shall be lawful for the justices of Assize, or Nisi Prius, or the commissioners of oyer and terminer and gaol delivery, by order in writing to be by them respectively signed, to direct any person in execution, and in the custody of any sheriff or other officer, in any county wherein they shall sit, to be brought up for the purpose of giving evidence in any cause or trial to be had before them respectively." So the Court of Bankruptcy in Ireland is empowered by warrant or order to cause any bankrupt, or any person supposed to be possessed of his goods, or to be indebted to him, or to be ac-

¹ These powers would seem to be still confined to the judges of the Queen's Bench Division of the High Court. Sed qu.

quainted with his dealings, to be brought from any prison in which he may be in custody for the purpose of being examined.¹ In England, and in Ireland, too, even "The County Court Judges" have been intrusted, to a limited extent, with the power of ordering prisoners to be brought up as witnesses before their respective Courts;² and similar powers have been conferred on certain functionaries, for the purpose of bringing military convicts under special circumstances before courts-martial or civil courts as witnesses.³

§ 1278. Besides these modes of enforcing the attendance of witnesses, which apply generally to proceedings before courts of ordinary common-law jurisdiction, more or less compulsory powers for the same purpose are intrusted to many courts or persons having a limited or special jurisdiction. The limits of this work will not admit of a full analysis, or even a complete enumeration of these powers, but a brief sketch will be given of such as appear to be of general importance. § 1154

§ 1279. The Examiners of the High Court of Justice, though authorised to administer oaths,⁴ are not empowered either to compel the attendance, or to punish the misconduct of witnesses, except by resorting to the cumbrous and costly process of invoking the intervention of the court.⁵ Some persons, well acquainted with the practical working of the present system, have strenuously urged the propriety of strengthening the hands of these functionaries, and of enabling them, without first applying to the court, to punish the improper conduct of witnesses;⁶ but, as yet, this measure, though well deserving of serious consideration, has not been sanctioned by the Legislature. § 1155.

§ 1280. When a subpoena is required for the attendance of a witness for the purpose of proceedings in Chambers, it shall issue § 1156

¹ 35 & 36 V., c. 58, § 73, Ir. See also, § 74, as to the costs of such removal.

² 19 & 20 V., c. 108, § 31; 27 & 28 V., c. 99, § 43, Ir.; 40 & 41 V., c. 56, § 3, Ir.

³ 44 & 45 V., c. 58, § 60, subs. 8; and § 63, subs. 7.

⁴ Ord. XXXVII., R. 19, cited, ante, § 506. In *Stuart v. Balkis Co.*, 53 L. J., Ch. 791, held by Chitty, J., that a witness required to attend before an examiner was not bound to do so unless served with a subpoena. See R. 20 of Ord. XXXVII., cited ante, p. 460.

⁵ Ord. XXXVII., R. 13, cited, ante, § 506. For the corresponding Irish enactment, see 30 & 31 V., c. 44, § 100, Ir.

⁶ See *Gresl. Ev.* 59.

from the Central Office upon a note from the judge.¹ Again, when a Chief Clerk² is directed by a judge in the Chancery Division to examine any party or witness, he is authorised to enforce the attendance of such party or witness by *summons*;³ and if this summons be not obeyed, the party or witness will be liable to process of contempt, in like manner as he would be, were he to disobey any order of the court, or any writ of subpoena.⁴ A

¹ Ord. XXXVII., R. 28.

² As to the attendance of witnesses before "the Taxing Officers of the Supreme Court, or of any Division thereof," see Ord. LXV., R. 27, subs. 25.

³ This summons is only good for one attendance, unless the examination of the witness be adjourned; *Lawson v. Stoddart*, 3 New R. 211, per Kindersley, V.-C.

⁴ Ord. LV., R. 16, provides, that "each Chief Clerk shall, for the purpose of any proceedings directed to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to require the production of documents, to take affidavits and acknowledgments, other than acknowledgments by married women, and, when so directed by the judge, to examine parties and witnesses, either upon interrogatories or *vivâ voce*, as the judge shall direct."

R. 17 provides, that "parties and witnesses summoned to attend before a Chief Clerk shall be bound to attend in pursuance of the summons, and shall be liable to process of contempt, in like manner as parties or witnesses are liable thereto in case of disobedience to any order of the Court, or in case of default in attendance in pursuance of any order of the Court, or of any writ of subpoena ad testificandum." For the corresponding Irish enactments, see 30 & 31 V., c. 44, §§ 138, 139, Ir.

The "Form of Summons by Chief Clerk," as given in App. L., No. 1 of the Rules of 1883, is as follows:—

Summons by Chief Clerk.

"In the High Court of Justice.

Chancery Division.

Mr. Justice.

In the matter of the estate of A. B., late of _____, in the county of _____, deceased.

Or,

Between C. D., petitioner,
and

E. F., Defendant.

The defendant E. F. [*or* G. H., of, &c.] is hereby summoned to attend at the Chambers of Mr. Justice _____, at the Royal Courts of Justice on the _____ day of _____, at _____ o'clock in the noon, to be examined [*or*, to be examined as a witness], on the part of the _____, for the purpose of the proceedings directed by Mr. Justice _____, to be taken before me,

Dated this _____ day of _____, 18 _____.

X. Y., Chief Clerk.

This summons was taken out by _____ of _____, in the county of _____, Solicitors for _____."

witness, also, who refuses to be sworn, when summoned before a Chief Clerk, does so at the risk of being committed by the court;¹ and if he answers in an unsatisfactory manner, an application should be made to have him examined by the judge.² He may, too, as it seems, himself apply to the Chief Clerk, on special grounds, either to have the assistance of counsel, or to have the inquiry adjourned into court.³

§ 1281. Under "The Companies' Act, 1862," the court which is § 1157 empowered to wind up the affairs of any company, and the commissioners who are authorised to take evidence, may respectively enforce the attendance of witnesses,⁴ and the production of documents,⁵ by summons and warrant. The summons cannot be claimed as a matter of right, but the court must be satisfied that to grant it will be just and beneficial.⁶ As a general rule the examination of the witness rests with the official liquidator, but the court, in its discretion, may empower any contributories to issue summonses, to attend the inquiry, and to examine or cross-examine the persons summoned.⁷ The practice in these cases has been assimilated to

¹ In re The Elect. Electr. Co. of Ireland, ex p. Bunn, 26 L. J., Ch. 614, per Romilly, M. R.; 24 Beav. 137, S. C.

² Hayward v. Hayward, Kay, App. xxxi. See, however, Venables v. Schweitzer, 16 Law Rep., Eq. 76.

³ In re The Elect. Electr. Co. of Ireland, ex p. Bunn, 26 L. J., Ch. 614; 24 Beav. 137, S. C.

⁴ 25 & 26 V., c. 89, §§ 115, 126, 138. See Swan's case, 10 Law Rep., Eq. 675; In re Engl. Jt. Stock Bk., 3 Law Rep., Eq. 303; In re Financial Ins. Co., 36 L. J., Ch. 687; In re Breach Loading Armoury Co., and In re Merchant's Co., 4 Law Rep., Eq. 453; In re Accidental & Mar. Ins. Co., 37 L. J., Ch. 56; 5 Law Rep., Eq. 22, S. C.; In re The Mercant. Credit Associat., Clement's case, 37 L. J., Ch. 295; 13 Law Rep., Eq. 179, n. 1, S. C.; In re Contract Corp., 40 L. J., Ch. 351; 6 Law Rep., Ch. App. 146, S. C.; Re The London Gas Meter Co., 41 L. J., Ch. 145; Druitt's case, 14 Law Rep., Eq. 6; Trower & Lawson's case, id. 8; Forbes' case, 41 L. J., Ch. 467; In re Bk. of Hindustan, Fricker's case, 13 Law Rep., Eq. 178, per Wickens, V.-C.; 41 L. J., Ch. 278, S. C.; Massey v. Allen, 47 L. J., Ch. 702; L. R., 9 Ch. D. 164, S. C.

⁵ See Ex p. Paine & Layton, 4 Law Rep., Ch. App. 215; 38 L. J., Ch. 305, S. C.; In re Smith, Knight, & Co., 4 Law Rep., Ch. App. 421.

⁶ In Re The Metropolitan Bk., 49 L. J., Ch. 651, per Ct. of App.; L. R., 15 Ch. D. 139, S. C., nom. Heiron's case.

⁷ Re Silkstone & Dodsworth Coal & Iron Co., 50 L. J., Ch. 752, per Fry, J.; S. C. in Ct. of App., nom. Whitworth's case, L. R., 19 Ch. D. 118; 51 L. J., Ch. 71, S. C.

that in bankruptcy, and the judges, very sensibly, are inclined to put a liberal interpretation upon the language of this statute, which enables them to summon "any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company."¹ It would seem that a witness summoned under this enactment has no *locus standi*, unless he can establish a want of jurisdiction,² to appeal against the order;³ and even if this be an erroneous view of the law, it is clear that a court of appeal would not interfere with the discretion of the judge, unless under extremely special circumstances.⁴ The witness, however, is entitled to be attended by his counsel or solicitor, who may ask him such questions as may be necessary to explain the evidence he has given, and who may also take notes of the proceedings for the purpose of conducting such re-examination, but for that purpose only.⁵ It is scarcely necessary to add, that any deposition, taken in accordance with the above provisions, may be used as evidence on a summons against the party by whom it has been made, but the court might possibly require that notice of the intention to read the deposition should first be given.⁶

§ 1283. In the court for the trial of either Parliamentary or § 1157B
Municipal Election Petitions, witnesses may be subpœnaed and sworn as in a trial at *Nisi Prius*,⁷ and the judge or presiding barrister has a further power, by order under his hand,⁸ of compelling

¹ See cases cited in last four notes. Also *Re Lisbon Steam Tramways Co.*, L. R., 2 Ch. D. 575,

² *Whitworth's case*, L. R., 19 Ch. D. 118, per Ct. of App.; 51 L. J., Ch. 71, S. C.

³ *Re The Gold Co.*, 48 L. J., Ch. 650, per Jessel, M. R.; L. R., 12 Ch. D. 82, S. C.

⁴ *Id.*, per Ct. of App. 48 L. J., Ch. 650; L. R., 12 Ch. D. 77, S. C.

⁵ In *re Cambrian Mining Co.*, 51 L. J., Ch. 221; L. R., 20 Ch. D. 376, S. C.

⁶ *Pugh & Sharman's case*, 13 Law Rep., Eq. 566, per Malins, V.-C.

⁷ 31 & 32 V., c. 125, § 31, continued till 31st Dec. 1884, by 46 & 47 V., c. 51, § 70, sch. 3; 45 & 46 V., c. 50, § 94, subs. 1.

⁸ The form may be as follows:—"Court for the Trial of an Election Petition [or of a Municipal Election Petition] for [Title] the day of . To A. B. [describe the person] You are hereby required to attend before the above Court at [place], on the day of , at the hour of [or, forthwith], to be examined as a witness in the matter of the said

the attendance of any person as a witness, who appears to him to have been concerned in the election to which the petition refers.¹ Disobedience of such order is, of course, a contempt of court; and the judge may examine any witness so compelled to attend, or, indeed, any person in court, though he be not called and examined by any party to the petition.² After the examination by the judge, however the witness may be cross-examined by either the petitioner, or the respondent, or both.³

§ 1184. Witnesses required to give evidence on oath before the *House of Lords* are served with an order of the House, signed by the assistant clerk of the Parliaments, which directs them to attend at the bar on a certain day to be sworn and examined.⁴ When a witness is required to testify before a Lords' Committee, he is ordered to attend, not at the bar of the House, but before the particular committee. Any committee may administer an oath to the witnesses examined before it;⁵ and the committees on Private Bills, in the event of the House making no special order, take evidence on oath.⁶ The *Select Committees*, however, now examine witnesses unsworn, unless otherwise ordered by the House.⁷ The service of the order must, generally, be personal, but if the witness be purposely keeping out of the way, it is usual to direct that a service at his house shall be deemed sufficient.⁸ If he disobey this summons, the House will order him to be taken into custody, either forthwith,⁹ or after the expiration of a certain time;¹⁰ and if the black rod cannot succeed in taking him, the House will address the Crown to issue a proclamation, offering a reward for his apprehension.¹¹ When the evidence of peers, peeresses, or Lords of Parliament is required,

petition, and to attend the said court until your examination shall have been completed. As witness my hand, M. N., Judge of the said Court [*or* A. B., the Barrister to whom the trial of the said petition is assigned].” Reg. Gen. M. T., 1868, r. 41; 37 L. J., C. P. 5; 4 Law Rep., C. P. 781, S. C.; Reg. Gen. M. T., 1872, r. 41; 7 Law Rep., C. P. 677.

¹ 31 & 32 V., c. 125, § 32; 45 & 46 V., c. 50, § 94, subs. 2 & 3.

² *Id.*

³ 31 & 32 V., c. 125, § 32; 45 & 46 V., c. 50, § 94, subs. 4.

⁴ 66 Lord's J. 400; May, L. of Parl. 397, et seq.

⁵ 21 & 22 V., c. 78, § 2.

⁶ Min. of H. of L. 4 June, 1857.

⁷ *Id.*

⁸ 66 Lord's J. 295.

⁹ *Id.* 400.

¹⁰ *Id.* 358.

¹¹ *Id.* 441.

the Lord Chancellor is ordered to write letters to them, desiring their attendance to be examined as witnesses;¹ and such persons are sworn by the Lord Chancellor at the table,² while all other witnesses, if required to be examined on oath, are sworn at the bar by the officer of the House.³ If the witness be a member, or an officer, of the House of Commons, a message is sent to that House requesting his attendance;⁴ upon which the Lower House returns answer, by its messenger, that it gives him leave to attend, adding, in case he be a member, "if he think fit."⁵ If the witness, on attending, refuse to be sworn, or prevaricate, or otherwise misbehave, he will be punished by the House as for contempt; and if he give false evidence after being sworn, he may be indicted for perjury.⁶

§ 1285. In the *House of Commons* the course is very similar, § 1159 witnesses being summoned to attend by an order of the House signed by the clerk, which is either personally served upon them, or, if they live at a distance, is forwarded to them by post, or sometimes by a special messenger. If, after service, the witness neglect to attend, or if he abscond, the Speaker, by order of the House, will issue his warrant, directing the serjeant-at-arms to apprehend the witness, and to bring him to the bar; whereupon he will generally be committed to Newgate; as will also all persons who aid him in his endeavours to keep out of the way.⁷ If the attendance of a Lord of Parliament or of an officer of the Upper House be desired the Commons adopt the same form of proceeding as that adopted by the Lords, when they require the attendance of a member of the Lower House;⁸ but whether this form be necessary, if the witness be simply a peer or peeress, is a matter upon which the two branches of the Legislature appear to be at issue.⁹ If the testimony of a member be desired by the House, or by a committee of the whole House, he is ordered to attend in his place; but if he be required to give evidence before a select committee, such committee should

¹ 75 Lords' J. 144.

² Id. 201.

³ May, L. of Parl. 404.

⁴ 75 Lords' J. 157.

⁵ Id. 164.

⁶ May, L. of Parl. 405, 406.

⁷ May, L. of Parl. 398; *Gossett v. Howard*, 10 Q. B. 359, 411, 451.

⁸ May, L. of Parl. 401, 402; 83 Com. J. 278; 91 id. 75; 82 id. 465.

⁹ May, L. of Parl. 402; 4 Lords' J. 812.

request his attendance, and if he refuse to appear, should acquaint the House therewith, who will then order him to attend, and, if necessary, will even commit him to the custody of the serjeant-at-arms, that he may be forthcoming at the proper time.¹ If a person in custody is required to give evidence, the Speaker usually issues his warrant, which is personally served on the gaoler by a messenger of the House, and by which he is directed to bring the witness in his custody to be examined.² Some doubts, however, have been entertained as to the legality of this course, and on one or two occasions, writs of habeas corpus ad testificandum have, in order to protect the gaoler, been applied for in the Court of Queen's Bench.³

§ 1286. If the witness is to be examined before a *Select Committee*, the chairman, by direction of the committee, in general signs an order for his attendance; and if this order be disobeyed, his conduct is reported to the House, which immediately issues the usual order, to be enforced as in other cases. The attendance of a witness before a committee on a private bill can only be enforced by an order of the House.⁴ § 1160

§ 1287. Under "The Parliamentary Witnesses Oaths Act, 1871,"⁵ the House of Commons is now empowered to administer an oath to the witnesses examined at the bar of the House, and any committee of the House may administer an oath to the witnesses examined before such committee. Any oath under the Act may be administered by the Speaker,⁶ or, in the case of a witness before the House or a committee of the whole House, by the clerk at the table;⁷ and any witness before a select committee may be sworn by the chairman, or by the clerk attending such committee.⁸ § 1161

¹ May, L. of Parl. 400.

² Id. 398; 90 Com. J. 533. The order of the House of Lords has been used *for the same purpose, May, L. of Parl. 397.

³ See ante, § 1275; In re Price, 4 East, 587; In re Pilgrim, 3 A. & E. 485.

⁴ May, L. of Parl. 399; 98 Com. J. 153, 174, 279, 288.

⁵ 34 & 35 V., c. 83, § 1.

⁶ Id.

⁷ Stand. Ord. passed 20 Feb., 1872.

⁸ Id.

§ 1288. The Act of 3 & 4 W. 4, c. 41, determines the mode by which witnesses are forced to attend before the *Judicial Committee of the Privy Council*, and enacts, in § 19, that the President of the Council may require the attendance of any witnesses, and the production of any deeds, evidences, or writings, by writ to be issued by him in the same form, as nearly as may be, as that in which a writ of subpœna ad testificandum, or of subpœna duces tecum, is now issued by the High Court; and that every person disobeying such writ, so to be issued by the President, shall be considered as in contempt of the Judicial Committee, and shall also be liable to the same penalties and consequences as if such writ had issued out of the Queen's Bench Division of the High Court; and may be sued for such penalties in that court.¹ § 1163

§ 1289. In the Probate Divisions of the High Courts, whether for England or Ireland, the attendance of witnesses and the production of documents are now enforced by the ordinary writs of subpœna ad testificandum and subpœna duces tecum, which are issued by the High Court;² and "every person disobeying any such writ shall be considered as in contempt of the court, and also be liable to forfeit a sum not exceeding 100*l.*"³ § 1163A

§ 1290. The Divorce Division of the High Court in England⁴ "may, under its seal, issue writs of subpœna or subpœna duces tecum, commanding the attendance of witnesses at such time and place as shall be therein expressed; and such writs may be served in any part of Great Britain or Ireland; and every person served

¹ Similar powers are conferred on the Court of Appeal in Chanc. in Ireland, by § 104 of "The Court of Admiralty, Ireland, Act, 1867," 30 & 31 V., c. 114, Ir. See, also, § 105 of the same Act.

² See ante, § 1265.

³ 20 & 21 V., c. 77, § 24; 20 & 21 V., c. 79, § 29, Ir. See *Shepherd v. Bee-tham*, 2 Law Rep., P. & D. 384. Also, 21 & 22 V., c. 95, § 23, which empowers the Registrars of the Principal Registry of the Court of Probate in England, whether any suit or proceeding be pending in the court or not, to issue subpœnas, requiring any persons to produce testamentary papers.

⁴ "The Matrimonial Division" of the High Court in Ireland would seem to have the same powers as the Chancery Division "for enforcing the attendance of persons required by it," 34 & 35 V., c. 49, § 6, Ir.; 40 & 41 V., c. 57, § 34, Ir.

with such writ shall be bound to attend, and to be sworn and give evidence in obedience thereto, in the same manner as if it had been a writ of subpœna, or subpœna duces tecum, issued from any of the said Superior Courts of Common Law and served in Great Britain or Ireland.”¹

§ 1291. The attendance of witnesses before the *Ecclesiastical Courts* in England is required by a *compulsory*, which is an instrument somewhat in the nature of a subpœna.² If the witness on the return of this process does not appear, the court may pronounce him contumacious;³ and on certifying the same to the Lord Chancellor within ten days, a writ de contumace capiendo will issue, unless the party be a Peer or Lord of Parliament, or a member of the House of Commons, whereupon he will be arrested and detained in custody, until he either submit to the court, or be absolved or discharged by order of the Ecclesiastical Judge.⁴ His expenses, however, must be tendered or paid by the party calling him, as in civil proceedings before the common-law courts.⁵ The Act for better enforcing Church Discipline,⁶ which authorises bishops to issue commissions of inquiry into the grounds of any charge or report against clerks in holy orders, and which empowers bishops to take ulterior proceedings against such clerks, reserving to the latter the right of appeal to the provincial Court of Appeal, provides, in § 17, that “it shall be lawful, in any such inquiry, for any three or more of the commissioners, and in any such proceeding, for the bishop, or for any assessor of the bishop, or for the Judge of the Court of Appeal of the province, to require the

¹ 20 & 21 V., c. 85, § 49. The subpœna is written or printed on parchment, and may include the names of any number of witnesses. See Rules of 1865 for Ct. of Divorce & Mat. Causes, r. 109, and Forms 16 and 18; and Rule 180 for same Court, made 30th Jan. 1869. See 1 Law Rep., P. & D. 757, 765, 766, 767, and 768.

² 3 Burn, Ec. Law, 310. See Reg. Gen. of 1877, for Consist. Ct. of Lond., Ord. ix., r. 4, and Forms cited L. R., 2 P. D. 379, 382.

³ *Wyllie v. Mott*, 1 Hagg. Ec. R. 34. See same Reg. Gen., Ord. xi., r. 1, cited L. R., 2 P. D. 380.

⁴ 2 & 3 W. 4, c. 93, § 1.

⁵ *Ayliffe*, Par. 536; 1 Ought. 121; 3 Burn, Ec. Law, 309.

⁶ 3 & 4 V., c. 86.

attendance of such witnesses, and the production of such deeds, evidences, or writings, as may be necessary; and such bishop, judge, assessor, and commissioners respectively, shall have the same powers for these purposes as now belong to the Consistorial Court and to the Court of Arches, respectively."

§ 1292, The Public Worship Regulation Act, 1874,¹ adopts a different practice from that which prevails in the ordinary Ecclesiastical Courts; for,—after enacting in § 9 that in all proceedings before the Judge appointed under the Act, the evidence shall be given *viva voce*, in open court, and upon oath,—it goes on to provide, that "the judge shall have the power of a court of record, and may require and enforce the attendance of witnesses, and the production of evidences, books, or writings, in the like manner as a judge of the High Court."²

§ 1293. The attendance of witnesses before the *Admiralty* § 1165 Division of the High Court is now enforced in the same manner as in the other Divisions.³ But the Act of 24 & 25 V., c. 10, further enacts, in § 21, that "the service in any part of Great Britain or Ireland of any writ of subpœna ad testificandum, or subpœna duces tecum, issued under seal of the Admiralty Division, shall be as effectual as if the same had been served in England or Wales."⁴

§ 1294. The Army Act, 1881, enacts, that "every person required to give evidence before a court-martial may be summoned or ordered to attend in the prescribed manner."⁵ The form of the summons as prescribed, with respect to all civil witnesses, is given in Appendix II. of the Rules of Procedure, and is in the nature of an order under the hand of the convening officer, the president of

¹ 37 & 38 V., c. 85.

² See Rules and Orders, made under the Act, on 22nd Feb. 1879, and reported in L. R., 4 P. D. 250, 261, 283; and in 49 L. J., Ord. & Rules, pp. 7, 22.

³ See ante, §§ 1239 & 1265. See, also, 3 & 4 V., c. 65, § 9; and *In re The Glory*, 7 Ec. & Mar. Cas. 262.

⁴ See similar enactments in "The Court of Admiralty, Ireland, Act, 1867," 30 & 31 V., c. 114, §§ 52, 69, Ir.

⁵ 44 & 45 V., c. 58, § 125.

the court, the judge-advocate, or the commanding officer of the prisoner.¹ The Act further provides with respect to all witnesses who are "subject to military law," that if any such witness makes default in attending, or refuses to take an oath or make a solemn declaration, or refuses to produce any document in his control legally required to be produced, or refuses to answer any question to which an answer may legally be required, or is guilty of contempt, he shall on conviction by a court martial other than the court to which he has been summoned, be liable, if an officer, to be cashiered, and if a soldier to be imprisoned, or in either case to suffer such less punishment as is mentioned in § 44 of the Act.² When a witness who is *not* subject to military law commits any of the above offences, the president of the court-martial, in the event of the witness having been paid or tendered the reasonable expenses of his attendance,³ may certify the offence "to any court of law in the part of her Majesty's dominions where it is committed, which has power to punish witnesses if guilty of like offences in that court;" and thereupon such last court shall investigate the matter, and if it seem just, punish the offender as if he had committed the offence before itself.⁴

§ 1295. The attendance of witnesses before *Naval Courts-Martial* is enforced by the Naval Discipline Act, 1866, which substantially enacts, that every person, civil, naval, or military, who may be required to give evidence, shall be summoned either by the Judge-Advocate, or by his deputy, or by the person duly appointed by the President of the court-martial to officiate as judge-advocate at the trial;⁵ and all witnesses so summoned who do not attend, or refuse to be sworn or to affirm, or refuse to give evidence, or to answer all such questions as the court may legally demand of them, or prevaricate, may be attached in the Queen's Bench Division of

¹ Rule 77, B. The mode of serving the summons is not prescribed, but the practice is to employ the police for that purpose, and to serve personally.

² 44 & 45 V., c. 58, § 28.

³ The Allowance Regulations, 1881, in Par. 564—573, give the Rules as to the expenses.

⁴ 44 & 45 V., c. 58, § 126, subs. 1 & 3.

⁵ 29 & 30 V., c. 109, §§ 61, 66.

the High Court in London or Dublin, or in the Court of Sessions in Scotland, or other court of law in any of her Majesty's dominions, in like manner as if they had disobeyed the process of such courts.¹ If the witness belong to her Majesty's navy, the court-martial, in the event of his non-attendance to give evidence on oath or affirmation, or of his prevarication, possesses also an alternative power of punishing him by any imprisonment not longer than three months; and the court-martial may also imprison him for any period not exceeding one month, if he be guilty of contempt.² The statute further provides, that "every person not subject to this Act, who may be so summoned to attend, shall be allowed and paid his reasonable expenses for such attendance, under the authority of the admiralty, or of the president of the court-martial on a foreign station."³

§ 1296. The Act of 6 & 7 W. 4, c. 106, provides for the attend- § 1167
ance of witnesses before the Court of the *Vice-Warden of the Stannaries*, and enacts, in § 9, that the service of every writ of subpoena to attend and give evidence hereafter to be issued out of either side of the Court of the Vice-Warden, and served upon any person in any part of England or Wales, shall be as valid and effectual in law, and shall entitle the party suing out the same to all and the like remedies by action or otherwise, as if the same had been served within the jurisdiction of the Court of the Vice-Warden; and that, in case the person so served shall not appear according to the exigency of the writ, the Court of the Vice-Warden, upon oath or affirmation to be taken in open court, or affidavit of the personal service of such writ, may transmit a certificate of such default under the seal of the court, to the Queen's Bench Division of the High Court; and the last-mentioned court shall proceed against, and punish by attachment or otherwise, according to the course and practice of that court, the person so having made default, in such and the like manner as the same court might have done, if such person had neglected or refused to appear in obedience to a writ of subpoena issued to compel the

¹ 29 & 30 V., c. 109, § 66.

² Id.

³ Id.

attendance of witnesses out of such last mentioned court. § 10 provides, that the Queen's Bench Division shall not, in any such case as aforesaid, proceed against or punish any person, nor shall any such person be liable to any action for having made default by not appearing to give evidence in obedience to any such writ of subpoena, unless it shall appear to such Court that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence, and of returning therefrom, had been tendered to him, at the time when the writ of subpoena was served upon him.

§ 1297. The Act of 13 & 14 V., c. 43, contains very similar § 1168 provisions to those just cited, for the purpose of compelling witnesses, who live out of the jurisdiction, to attend either before the *Court of Chancery of the County Palatine of Lancaster*, or before the registrar of that court as well in his capacity of examiner as in that of master, or before any commissioners appointed by that court for the examination of witnesses.¹ Somewhat similar enactments are also contained in "The High Peak Mining Customs and Mineral Courts Act, 1851,"² for the purpose of compelling witnesses to attend before the Barmote Courts in Derbyshire.

§ 1298. The Land Judges of the Chancery Division of the High § 1168A Court in Ireland, may, by summons under their seal,³ require the attendance before any judge or officer of the court, at a time and place to be mentioned in such summons, of any witness, and may also require him to produce documents; and every such judge has the same power of enforcing attendance and of punishing disobedience, as is vested by law in the Chancery Division of the Irish High Court.⁴ The same judges are also empowered, like the Chancery Division, to enforce the attendance of witnesses before commissioners or other persons appointed by them to receive evidence.⁵

§ 1298A. The Irish Land Commission have all the powers vested

¹ See §§ 17 & 18.

² 14 & 15 V., c. 94, §§ 31, 40.

³ See 40 & 41 V., c. 57, §§ 7, 38, Ir.

⁴ 21 & 22 V., c. 72, § 33, Ir.

⁵ Id. § 35, Ir.

in the Chancery Division of the High Court of Justice in Ireland for enforcing the attendance of witnesses after a tender of their expenses, the examination of witnesses orally or by affidavit, the production of documents, the issuing commissions for the examination of witnesses, and the punishing of persons refusing to give evidence or to produce documents, or otherwise guilty of contempt in open Court.¹

§ 1299. The attendance of witnesses before *coroners* is provided for by statute 7 & 8 V., c. 92, § 17, which enacts, that “if any person, having been duly summoned as a juror or witness to give evidence upon any coroner’s inquest, as well of liberties and franchises contributing to the county rates, as of counties, cities, and boroughs, shall not, after being openly called three times, appear and serve as such juror, or appear and give evidence on such inquest,” the coroner may impose on him a *fine not exceeding forty shillings*; and the Act then provides, “that nothing therein contained shall be construed to affect any power now by law vested in the coroner, for compelling any person to appear and give evidence before him on any inquest or other proceeding, or for punishing any person for contempt of court, in not so appearing and giving evidence, or otherwise.” This proviso, in its present general form, might have been well spared, since the leaving undefined power in the hands of petty officers can seldom be productive of real benefit to the public, and may often furnish an odious mode of annoying and oppressing particular individuals. Still, some proviso was necessary, in order to leave unaffected the Act of 6 & 7 W. 4, c. 89, which,—after authorising coroners, in the first five sections, to order *medical witnesses* to attend inquests, &c., and enabling such witnesses to claim a certain remuneration for their attendance,²—enacts, in § 6, that, where any order for the

¹ 44 & 45 V., c. 49, § 48, subs. 3, Ir.

² The fee to which, in Great Britain, a legally qualified medical practitioner is entitled, for attending to give evidence at an inquest, is one guinea, and for making a post-mortem examination of the deceased, either with or without an analysis of the contents of the stomach or intestines, and for attending to give evidence thereon, is two guineas. See § 3, and Sch. to the Act. These sums must now be paid to the medical man by the coroner immediately after the

attendance of any medical practitioner has been personally served upon him, or where, though not personally served, it has been received by him in sufficient time to be obeyed, or where it has been served at his residence:—in all these cases, the medical man shall, in case of disobedience, *forfeit the sum of five pounds*, upon complaint made by the coroner, or any two of the jury, before two justices having jurisdiction in the place where the inquest was held, or in the parish where the medical practitioner resides; and the justices are required, upon such complaint, to adjudicate thereon, and if the medical man does not show good cause for not having obeyed the order, to enforce the penalty by distress and sale of his goods.

§ 1300. The mode of compelling witnesses to attend before the Courts of Bankruptcy is now regulated in part by the Bankruptcy Rules of 1883, and in part by the Bankruptcy Act of the same year.¹ The former provide, by R. 53, that “a subpœna for the attendance of a witness shall be issued by the court at the instance of an official receiver, a trustee, a creditor, a debtor, or any respondent in any matter, with or without a clause requiring the production of books, deeds, papers, and writings in his possession or control, and in such subpœna the names of three witnesses may be inserted.”² R. 54 then declares, that “a sealed copy of the subpœna shall be served *personally* on the witness by the person at whose instance the same is issued, or by his solicitor, or by an officer of the court, or by some person in their employ, within a reasonable time before the time of the return thereof;” while R. 55 provides, that “service of the subpœna may, where required, be proved by affidavit.” § 1170

§ 1300A. Under R. 61, “The Court may, in any matter, at any stage of the proceedings, order the attendance of any person, for

termination of the proceedings at any inquest, and the coroner will be repaid out of the county rates or borough fund; 7 W. 4 & 1 V., c. 68, §§ 2, 3. See, as to the Irish regulations, 9 & 10 V., c. 37, §§ 22, 28, 32–35, 44, Ir.; and 44 & 45 V., c. 35, § 5, Ir.

¹ 46 & 47 V., c. 52.

² See Forms 104, 105, and 106, the two former applicable in the London Bankruptcy Court, the last in the County Courts. In not one of the forms is any penalty specified. See ante, § 1239.

the purpose of producing any writings or other documents named in the order, which the Court may think fit to be produced;" and further, by R. 58, it may, in any matter where it shall appear *necessary* for the purposes of justice, make an order for the examination upon oath of any person, either before the Court, or any of its officers, or before any other person and at any place. If any person wilfully disobeys any such *order* or *subpoena*, he shall, under R. 62, "be deemed guilty of contempt of court, and may be dealt with accordingly." The refusal of a witness to be sworn, or to answer any lawful question, will be regarded also in the light of a grave contempt.¹ R. 63 further provides, that, "any witness, other than the debtor, required to attend for the purpose of being examined or producing any document, shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial in court."²

§ 1301. In addition to the above general regulations, the Bankruptcy Act, 1883,³ contains in sect. 27, a special enactment, which has been framed with the view of facilitating the discovery of the property of debtors. It is in these words:—" (1) The court may, on the application of the *official receiver* or *trustee*, at any time after a receiving order has been made against a debtor, summon⁴ before it the debtor, or his wife, or any person known or suspected⁵ to have in his possession in any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings, or property; and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings, or property."⁶ (2.) If any

¹ Ex parte Close, re Bennett & Glave, L. R., 5 Ch. D. 115, per Ct. of App.; 46 L. J., Bk. 81, S. C.

² See Scale of Allowances, printed in Appendix.

³ 46 & 47 V., c. 52. The Act of 20 & 21 V., c. 60, Ir., contains in §§ 126, 308, somewhat similar provisions respecting the attendance of witnesses before The Court of Bankruptcy in Ireland. See 35 & 36 V., c. 58, § 6, Ir. See, also, ante, § 1277.

⁴ See Banktcy. Rules of 1883, F. 107.

⁵ See Cooper v. Harding, 7 Q. B. 928.

⁶ See Ex p. Tatton, re Thorp, L. R., 17 Ch. D. 512; 50 L. J., Ch. 792, S. C., nom. Re Thorp, ex p. Tatton.

person so summoned, after having been tendered a reasonable sum,¹ refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting, and allowed by it, the court may, by warrant,² cause him to be apprehended and brought up for examination. (3.) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property."

§ 1302. The enactment just cited is not remarkable for precision § 1172 of language; but most of its obscurities have been cleared up either by Rule, or by judicial decision. And first, it is established by Rule,³ that the application for a summons must be in writing, and must state shortly the grounds on which it is made; and if it be *not* made by the trustee, official receiver, or Board of Trade, it must be verified by affidavit. Next, though the Act mentions only the official receiver and trustee as the persons who are to apply for the summons, it seems clear from the above rule, and also from several legal decisions,⁴ that the Court has power, if it be thought desirable, to act at the instance not only of the Board of Trade, but of any creditor, or of the bankrupt himself, and to order the examination of any person, including even the trustee. Thirdly, it appears,—though the Act is silent on the subject,—that the Court has a discretion to direct, that the summons shall be served by any person who is authorised to serve a subpoena;⁵ but it is still a matter of doubt whether the summons requires personal service like the subpoena, or whether, in the event of the witness keeping out of the way, it may be served by delivery at his house. It seems, too, that the Court would have no jurisdiction to order any

¹ The witness so summoned is not entitled to the costs of employing a solicitor or counsel, *Ex p. Waddell, in re Lutscher*, L. R., 6 Ch. D. 328, per Ct. of App.; nor to a copy of his deposition, unless he be also a creditor, *Ex p. Pratt, re Hayman*, L. R., 21 Ch. D. 439.

² See Bkptcy. Rules of 1883, F. 120.

³ Bkptcy. Rules of 1883, B. 70.

⁴ *Ex p. Crossley, re Taylor*, 13 Law Rep. Eq. 409: 41 L. J., Bk. 35, S. C.; *Ex p. Nicholson, re Willson*, L. R., 14 Ch. D. 243. per Ct. of App.; *Ex p. Austin*, L. R., 4 Ch. D. 13.

⁵ *Ex p. Bolland, re Holden*, 19 Law Rep., Eq' 131.

witness brought before it to furnish an account in writing of his dealings with the bankrupt;¹ and it is at least questionable whether it would have power to compel any person present to give evidence, unless he be attending by reason of a subpoena, a summons, or a warrant.²

§ 1305. The mode of compelling witnesses to attend before the *County Courts*, is regulated in part, by the Act of 9 & 10 V., c. 95, in part, by the Act of 38 & 39 V., c. 50, and in part, by the County Court Rules, 1875. The last-named Act by § 2, enacts, that “either of the parties to an action or any other proceeding may obtain of the registrar of the court summonses to witnesses, with or without a clause requiring the production of books, deeds, papers, and writings in the possession or control of the person summoned as a witness;³ and such summonses, and any summonses which are now or may be required to be served personally, may under such regulations as may be prescribed by rules of court, be served by a bailiff of the court or otherwise.” Then comes Order XIV. of the County Court Rules, 1875, which provides in R. 1, that “summonses to witnesses may be issued without leave of the court, to be served either in the home or in any foreign district,⁴ and may, by leave of the judge or registrar, be issued in blank, and served by the party applying for the same or his solicitor, or by some person in the permanent and exclusive employment of the party or his solicitor,⁵ but only *one* name shall be inserted in such summons.” R. 2 provides,—with almost ludicrous caution,—that “it shall be sufficient if a summons to a witness be served a reasonable time before the return day;” and then, The County Court Act, 1846,⁶ enacts, by § 86, “that every person on whom any such summons shall have been served, either personally or in such other manner as shall be directed by the general rules or practice of the

¹ Ex p. Reynolds, re Reynolds, 52 L. J., Ch. D. 223.

² See ante, § 1242, ad fin.; also, § 122 of the now repealed Act of 12 & 13 V., c. 106.

³ Cy. Ct. R. 1875. Forms 20 & 21.

⁴ This provision resolves a doubt which formerly existed, respecting the legality of the service when the witness lived out of the jurisdiction.

⁵ See form of affidavit of service of summons, F. 289, C. C. R. 1876.

⁶ 9 & 10 V., c. 95.

courts,¹ and to whom at the same time payment or a tender of payment of his expenses shall have been made, on such scale of allowance as shall be from time to time settled by the general rules of practice of the court,² and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books, papers, or writings required by such summons to be produced; and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn and give evidence, shall forfeit and pay such fine, not exceeding *ten pounds*, as the judge shall set on him; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the general fund of the court in which the fine was imposed."

§ 1306. It will be seen that, by virtue of this enactment, any refractory witness, who refuses without sufficient cause to produce "any books, papers, or writings required" by the County Court, is liable to a penalty of £10; and most persons would imagine that the power of imposing such a fine would be sufficient to enforce obedience to the summons. The framers, however, of the County Court Rules of 1875 think otherwise, for in Order XIV., Rule 4, they have specially provided, that "where a witness served with a summons shall not at the trial produce the documents required, the court may, upon admission or proof of the service of such summons within a reasonable time, and that such documents are in the possession or power or under the control of the party so served, and that they relate to the matter then pending before the court, *make an order for their production* by him, and the court may deal with them, when so produced, and with all costs occasioned by their non-production, as may appear just: Provided that nothing herein shall prevent the court from receiving secondary evidence,

¹ Under the Cy. Ct. R. 1875, Ord. viii. R.R. 9, 26, the service may be either personal, or by delivering the summons "to some person apparently sixteen years old, at the house, or place of dwelling, or place of business," of the witness; but no place shall be deemed his place of business, unless he be the master or one of the masters of it.

² See post, Appendix, as to this Scale.

where admissible, of any documents the production of which has been required as above."

§ 1307. By the Act of 6 & 7 V., c. 18, §§ 35, 50, and 51, *re-* § 1179
vising barristers are empowered to require, by summonses under their hands, the attendance of assessors, overseers, and relieving and other parish officers, who, in the event of their disobedience, are liable, upon proof of the service of the summons, to be fined by the barrister any sum not exceeding five pounds, nor less than twenty shillings.¹ A similar fine may also now be imposed by a revising barrister upon any person, who, having been summoned under the barrister's hand, to attend at the court and give evidence or produce documents for the purpose of the revision, and having had tendered to him his reasonable expenses,—either fails to attend, or fails to answer any legal question or to produce any document that can be legally required of him.²

§ 1308. When any cause or matter, or any question in any § 1180
 cause or matter, is referred to to a *referee*, whether official or special,³ the attendance of witnesses before him "may be enforced by subpoena."⁴ But the attendance of witnesses before ordinary *arbitrators* is still regulated in England by §§ 39 and 40 of 3 & 4 W. 4, c. 42, and in Ireland by §§ 63 and 64 of 3 & 4 V., c. 105; which sections respectively enact, that, where any reference shall have been made by any rule of court, or judge's order, or order of *Nisi Prius* in any action, or by any submission to reference containing an agreement that it shall be made a rule of court, the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or any judge may, by rule or order, command the attendance and examination of any person, or the production of any documents, mentioned therein; and the disobedience of such rule or order shall be deemed a contempt of court, if, in addition to the service of the same, an appointment of the time and place of attendance, signed by one at least of the arbitrators or by the umpire before whom the attendance is required, shall also

¹ See, also, the Irish Act of 13 & 14 V., c. 69, §§ 56 and 57.

² 41 & 42 V., c. 26, § 36.

³ *Judicat. Act*, 1873, 36 & 37 V., c. 66, § 57.

⁴ *Rules of Sup. Ct.*, 1883, *Ord. XXXVI. R. 49.*

be served, either together with or after the service of such rule or order: Provided that every person whose attendance is required shall be entitled to the like conduct-money, and payment of expenses, and for loss of time, as upon attendance at any trial; that the application made to the court or judge for such rule or order, shall set forth the county where the witness is residing at the time, or satisfy the court or judge that he cannot be found; and that no person shall be compelled to produce, under any such rule or order, any writing or other document that he might have withheld at a trial, or to attend on more than two consecutive days, to be named in the order. The practice of the Common Law Courts on this subject,—which, it may be noted in passing, is alike applicable to ordinary arbitrations, and to references before the Master,¹—has been followed in the Equity Courts; and now, whenever a submission to arbitration is made a rule of the Chancery Division, an order for the attendance of witnesses before the arbitrator can be obtained from the Chief Clerk as of course.² So, where a matter in bankruptcy is referred to arbitration, the County Court Judge has jurisdiction to make an order, and issue a subpoena to compel the attendance of a witness before the arbitrator.³

§ 1309, Under “The Councils of Conciliation Act, 1867,” § 1181 certain disputes between masters and workmen may be referred to arbitration, and in that event, the chairman of the Council may summon such witnesses as are required to give evidence, and the arbitrators may examine them upon oath. Any witness disobeying such summons, is liable to be committed to prison by a justice of the peace.⁴ So, under “The Friendly Societies Act, 1875,” the chief or other registrar, to whom any dispute is referred, may administer oaths and require the attendance of parties and witnesses, and the production of books and documents; and any person refusing to attend, or to produce any documents, or to give evidence,

¹ O’Flanagan v. Geoghegan, 16 Com. B., N. S. 637, per Willes, J.

² Re Ricketts, 3 New R. 56, per Romilly, M. R.; Clarbrough v. Toothill, L. R., 17 Ch. D. 787, per Jessel, M. R.; 50 L. J. Ch. 743, S. C.

³ Ex p. Bolland, re Ackary, 45 L. J., Bky. 133; L. R., 3 Ch. D. 125, S. C.

⁴ 30 & 31 V., c. 105, § 4. This Act is very obscurely worded, and the Forms in the Sch. are repealed by 41 & 42 V., c. 79, 1st Sch. See, also, 5 G. 4, c. 96, §§ 2, 9, and Sch.; and 35 & 36 V., c. 46, § 1, subs. 9.

is guilty of "an offence" under that Act.¹ So, under "The Land Transfer Act, 1875," the registrar, or any of his officers, "authorised by him in writing," may administer oaths, and "by summons under the seal of the office" may require the attendance of witnesses, and the production of documents; and if any person, after the delivery to him of such summons, and the payment or tender of his reasonable charges, wilfully neglects or refuses to attend, or produce documents, or give evidence, he is liable to a penalty not exceeding £20, to be recovered on summary conviction.²

§ 1310. It has been stated in a former part of this work,³ that § 1182 under the provisions of the Acts of 13 G. 3, c. 63, 1 W. 4, c. 22, and 3 & 4 V., c. 105, § 66, the judges of the Queen's Bench Division of the High Court, whether in England or in Ireland, are respectively authorised to grant *writs of mandamus or commissions* to the judges of India, of the colonies, and of other places under her Majesty's dominion, empowering them to examine witnesses in certain cases; and § 2 of the second-named, and § 67 of the last-named Act, respectively provide, that whenever any such writ or commission shall issue, "the judge or judges, to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the court, whereof they are judges, does or may possess for that purpose in causes or suits depending in such court."

§ 1311. It has further been shown,⁴ that each of the judges of the High Court, may, under Order XXXVII., Rules 5 and 7, order witnesses to be examined, or to produce documents, before any officer of the court, or other person appointed, and at any place; and under R. 8, the wilful disobedience of any such order is deemed a contempt of court. R. 9 provides, that any person whose attendance shall be so required shall be entitled to the like conduct-money, and payment for expenses, and loss of time, as upon attendance at a trial: and, by virtue of R. 7, no person can be compelled to produce under any such order any document, that he would not be compellable to produce at the hearing or trial. Under R. 17 the

¹ 38 & 39 V., c. 60, § 22, subs. (b).

³ Ante, §§ 500—505.

² 38 & 39 V., c. 87, §§ 109, 110.

⁴ Ante, § 506.

examiner may, and if need be, shall make a special report to the court touching such examination; and the conduct or absence of any witness or other person thereon; and the court or judge may direct such proceedings, and make such order as, upon the report, they or he may think just."

§ 1312. Although the Acts and Rules referred to in the last two sections thus contain provisions for enforcing the attendance of witnesses, either before the colonial judges, when acting as commissioners, or before examiners, when acting within the jurisdiction of the court appointing them, no means are afforded for compelling witnesses to attend and be examined under any commission, which, issuing from a court in one part of the United Kingdom, is to be executed in another part beyond the jurisdiction of such court. An Act, however, was passed in the year 1843 to remedy this defect;¹ which,—after reciting that "there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the Courts of Law or Equity in England or Ireland, or by the Courts of Law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof,"—enacts in § 5, that "if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners; and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of *law*² in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid, to appear before such commissioner

¹ 6 & 7 V., c. 82.

² Quære as to the power of the Chancery Division to act under this statute.
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or commissioners, and to be examined under such commission; and it shall be lawful for the court or judge to whom such application shall be made, by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned, in such rule or order." § 6 further enacts, that "upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpœna in England or in Ireland; and if such disobedience shall happen in Scotland, it shall be competent to the Lord Ordinary on the bills, upon an application made to him, by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order." § 7 then provides, that "every person, whose attendance shall be so required, shall be entitled to the like conduct-money and payment of expenses and for loss of time, as for and upon attendance at any trial in a court of law; and that no person shall be compelled to produce under such rule or order any writing or other document, that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order."

§ 1313. The statute just mentioned, though valuable as far as it extends, still leaves the law defective in two particulars. First, it grants no relief, where a witness residing in her Majesty's dominions refuses to be examined before a commission, which has issued from a foreign court; and next, it is inapplicable to cases where witnesses living in this country are required to testify in some action, which is pending in an Indian or colonial court, or where witnesses resident in one of the colonies are required to testify in a suit, which has been instituted either in an another colony or in this

§ 1183A

country. To both these defects, however, at least a partial remedy has, since 1843, been applied. The Legislature first interposed in 1856, and passed an Act,¹ the object of which was to afford facili-

¹ 19 & 20 V., c. 113. This Act,—which is now called the “Foreign Tribunals Evidence Act, 1856” (see 41 & 42 V., c. 67, Sched. 1),—is as follows:—

§ 1. “Where, upon an application for the purpose, it is made to appear to any court or judge having authority under this Act, that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge, by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such court or judge in a cause depending in such court or before such judge.

§ 2. “A certificate under the hand of the ambassador, minister, or other diplomatic agent of any foreign power, received as such by her Majesty, or in case there be no such diplomatic agent, then of the consul-general or consul of any such foreign power at London, received and admitted as such by her Majesty, that any matter, in relation to which an application is made under this Act, is a civil or commercial matter pending before a court or tribunal in the country of which he is the diplomatic agent or consul, having jurisdiction in the matter so pending, and that such court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matter so certified; but where no such certificate is produced, other evidence to that effect shall be admissible.

§ 3. “It shall be lawful for every person authorised to take the examination of witnesses by any order made in pursuance of this Act, to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorised; and if upon such oath or affirmation any person making the same wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury.

§ 4. “Provided, always, That every person, whose attendance shall be so required, shall be entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance at a trial.

§ 5. “Provided also, That every person, examined under any order made under this Act shall have the like right to refuse to answer questions tending to criminate himself, and other questions, which a witness in any cause pending in the court by which, or by a judge whereof, or before the judge by whom, the order for examination was made would be entitled to; and that no

ties for taking evidence in her Majesty's dominions,—not indeed in reference to all proceedings, criminal¹ as well as civil, which may be pending before foreign tribunals,—but in relation exclusively to *civil and commercial matters*. For this purpose the statute authorises the judges of certain superior courts in England, Ireland, Scotland, and the colonies, on application being made to them on behalf of any foreign court, “before which any civil or commercial matter is pending,” to order any witnesses within the jurisdiction of their respective courts to attend before, and to be examined by, such persons as shall be named in the order; and the examiners are empowered to administer all necessary oaths. The Act further provides, that the witnesses, as at an ordinary trial, shall be entitled to conduct money, and shall be protected from answering criminal questions, and from producing documents which they are privileged to withhold.

§ 1314. In the session of 1859 a second Act was passed,² which § 1183B

person shall be compelled to produce, under any such order as aforesaid, any writing or other document that he would not be compellable to produce at a trial of such a cause.

§ 6. “Her Majesty’s Superior Courts of Common Law” in London “and in Dublin respectively, the Court of Sessions in Scotland, and any supreme court in any of her Majesty’s colonies or possessions abroad, and any judge of any such court, and every judge in any such colony or possession who, by any order of her Majesty in Council, may be appointed for this purpose, shall respectively be courts and judges having authority under this Act.”

¹ As to criminal proceedings, see post, § 1315.

² 22 V., c. 20. This Act,—which is now called the “Evidence by Commission Act, 1859,” (see 41 & 42 V., c. 67, Sch. I.),—is as follows:—

§ 1. “Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act, that any court or tribunal of competent jurisdiction in her Majesty’s dominions has duly authorised, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such court or tribunal of any witness or witnesses out of the jurisdiction of such court or tribunal, and within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination before the person or persons appointed, and in manner and form directed, by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any

—after reciting that it is expedient to afford facilities “for taking evidence in, or in relation to, actions, suits, and proceedings pending before tribunals in her Majesty’s dominions, in places in such dominions out of the jurisdiction of such tribunals,”—goes on to enact, in substance, that whenever any court in her Majesty’s dominions shall have authorized, by commission, order, or other process, the obtaining of the testimony of any witness out of its jurisdiction, in or in relation to any action, suit, or proceeding pending in such court, certain superior judges enumerated in the writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such court or judge in a cause depending in such court or before such judge.

§ 2. ‘ Every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury.

§ 3. “Provided always, That every person, whose attendance shall be so ordered, shall be entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance at a trial.

§ 4. “Provided also, That every person examined under any such commission, order, or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any case pending in the court by which, or by a judge whereof, or before the judge by whom, the order for examination was made would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at the trial of such a cause.

§ 5. “Her Majesty’s Superior Courts of Common Law” in London “and in Dublin respectively, the Court of Session in Scotland, and any supreme court in any of her Majesty’s colonies or possessions abroad, and any judge of any such court, and every judge in any such colony or possession who, by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be courts and judges having authority under this Act.

§ 6. “It shall be lawful for the Lord Chancellor of Great Britain, with the assistance of two of the judges of the Courts of Common Law” in London, “so far as relates to England, and for the Lord Chancellor of Ireland, with the assistance of two of the judges of the Courts of Common Law at Dublin, so far as relates to Ireland, and for two of the judges of the Court of Session, so far as relates to Scotland, and for the chief or only judge of the supreme court in any of her Majesty’s colonies or possessions abroad, so far as relates to such colony or possession, to frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this Act, and regulating the procedure under the same.” No rules or orders have been framed under this section.

Act shall be empowered,—provided the witness be living within their jurisdiction,—to command his attendance before the appointed commissioners, to order his examination, and to give all other necessary directions on the subject.¹ The witness, as in the two preceding Acts, may claim the payment of his charges, and the usual protection with respect to the answering of questions and the production of papers.

§ 1315. The Legislature again interposed in 1870, and by the Extradition Act² of that year, extended the provisions of the Act of 19 & 20 V., c. 113,³ to all criminal proceedings which may be pending before foreign tribunals, and which are not of a *political* character. § 24 enacts, with this view, that “the testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign State, in like manner as it may be obtained in relation to any civil matter,” under the Act just cited; “and all the provisions of that Act shall be construed as if the term ‘civil matter’ included a criminal matter, and the term ‘cause’ included a proceeding against a criminal. Provided that nothing in this section shall apply in the case of any criminal matter of a political character.”⁴

§ 1316. The Acts of 11 & 12 V., c. 42, and 11 & 12 V., c. 43, § 1184 which were passed in the year 1848, contain clauses of much importance, as regulating, in two large classes of cases, the mode of enforcing the attendance of witnesses before *Justices of the Peace*.⁵ The first-named Act,—which was passed to facilitate the performance of duties by magistrates out of session with respect to *persons charged with indictable offences*,—enacts, in § 16, that “if it shall be made to appear to any Justice of the Peace by the oath

¹ See *Campbell v. Att.-Gen.*, 2 Law Rep., Ch. App. 571; 36 L. J., Ch. 600, S. C.

² 33 & 34 V., c. 52.

³ Cited, ante, § 1313.

⁴ See, also, 36 & 37 V., c. 60, § 5.

⁵ The mode of enforcing the attendance of witnesses before the inferior courts in *Scotland*, is regulated by 27 & 28 V. c. 53, §§ 6, 8, 10, Sch. E. 1 & 2, and Sch. F. 2. With respect to the police courts in *Edinburgh*, see 30 & 31 V., c. 58, Sch. §§ 175, 179—181.

or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, such justice may and is hereby required to issue his *summons*¹ to such person, under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons before the said justice, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and *no just excuse* shall be offered for such neglect or refusal, then, (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode) it shall be lawful for the justice or justices, before whom such persons should have appeared, to issue a *warrant*² under his or their hands and seals, to bring and have such person at a time and place to be therein mentioned before the justice who issued the said summons, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify as aforesaid, and which said warrant may, if necessary, be backed as hereinbefore is mentioned,³ in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or if such justice shall be satisfied by evidence upon oath or affirmation that it is *probable* that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his *warrant*⁴ *in the first instance*, and which if necessary, may be backed as aforesaid;⁵ and if on the appearance of such person so

¹ See form in Sch. to Act, L. 1.

² See Id., L. 2.

³ As to the backing of these warrants, see post, § 1318.

⁴ See form in Sch. to Act, L. 3.

⁵ See post, § 1318.

summoned before the said last-mentioned justice or justices, either in obedience in the said summons, or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or, having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having there jurisdiction, may by warrant¹ under his hand and seal *commit* the person so refusing to the common gaol or house of correction for the county, riding, liberty, city, borough, or place, where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding *seven days*, unless he shall in the meantime consent to be examined and to answer concerning the premises.”

§ 1317. The Act of 11 & 12 V., c. 43,—which, subject to a few § 1185 exceptions to be personally mentioned,² relates to *summary convictions and orders* by justices out of sessions,—contains, in § 7, similar provisions for enforcing the attendance of witnesses; excepting only that, before the justice can issue his warrant for the apprehension of a witness who has disobeyed a summons, proof upon oath or affirmation must be given that “a reasonable sum was paid or tendered to the witness for his costs and expenses in that behalf.”

§ 1318. If the witness against whom any warrant shall be issued § 1186 under either of these Acts shall not be found within the jurisdiction of the justice issuing the same, or “if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place beyond such jurisdiction, whether in England, Wales, Ireland, Scotland, or the Channel Islands, any justice or other officer, within whose jurisdiction the witness shall be, or be supposed to be, may, “upon proof alone being made on oath of the handwriting of the justice issuing such warrant,” make an indorsement³ on the

¹ See form in Sch. to Act, L. 4.

² Post, § 1319.

³ See form in Sch. K. to 11 & 12 V., c. 42.
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same, authorising its execution within his jurisdiction; and the warrant so backed may then be executed as if it had originally issued in such last-mentioned place.¹

§ 1318A. Where a court of summary jurisdiction would have power to issue a summons to a witness, provided he were within the jurisdiction, it may now, though the witness be out of the jurisdiction, still issue the summons if the witness be in England; and any court of summary jurisdiction for the place in which the witness is believed to be, may, on proof on oath of the signature of the summons, indorse it; and the witness, on being served with the summons so indorsed, and being paid or tendered a reasonable sum for his expenses, must attend the court on pain of being apprehended.²

§ 1319. It has been stated just above, that the Act of 11 & 12 V., c. 43, does not apply to *all* summary convictions and orders. The main *exceptions* are pointed out in section 35³ of the Act, as amended by the Second Schedule of the Summary Jurisdiction Act, 1879,⁴ and consist of orders of removal; orders relating to lunatics; and bastardy orders and warrants. With respect, however, to orders of removal and bastardy orders, justices may enforce the attendance of witnesses by *summons* and *warrant* under 7 & 8 V., c. 101, § 70,

¹ 11 & 12 V., c. 42, §§ 11—16; 11 & 12 V., c. 43, §§ 3, 7.

² 42 & 43 V., c. 49, § 36.

³ Which enacts, that “nothing in this Act shall extend, or be construed to extend, to any warrant or order for the removal of any poor person, who is or shall become chargeable to any parish, township, or place; or to any complaints or orders made with respect to lunatics, or the expenses incurred for the lodging, maintenance, medicine, clothing, or care of any lunatic or insane person; [nor to any information or complaint, or other proceeding under or by virtue of any of the statutes relating to her Majesty’s revenue of exercise or customs, stamps, taxes, or post-office;] nor shall anything in this Act extend, or be construed to extend, to any complaints, orders, or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to the backing of warrants for compelling the appearance of such putative father, or warrants of distress, or to the levying of sums ordered to be paid, or to the imprisonment of a defendant for non-payment of the same.” The words above, which are printed between brackets, were repealed by 42 & 43 V., c. 49, § 55, and 2nd Sch.

⁴ 42 & 43 V., c. 49.

which enacts, that, "in any proceedings to be had before justices in petty or special sessions, or out of sessions, under the provisions of that Act, or of any of the Acts required to be construed as one Act therewith"¹ (that is, 5 & 6 V., c. 57; 4 & 5 W. 4, c. 76; 5 & 6 W. 4, c. 69; 6 & 7 W. 4, c. 96; 1 & 2 V., c. 25, § 2; 7 W. 4 & 1 V., c. 50; and 2 & 3 V., c. 84, except so far as the provisions of any former Act shall have been expressly altered or amended by the provisions of any subsequent Act), "if any party to such proceedings request that any person be summoned to appear as a witness in such proceedings, it shall be lawful for any justice to *summon* such person to appear and give evidence upon the matter of such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the time and place appointed in such summons, and if proof upon oath be given of personal service of the summons upon such person, and that the reasonable expenses of attendance were paid or tendered to such person, it shall be lawful for such justice, by *warrant* under his hand and seal, to require such person to be brought before him, or any justice before whom such proceedings are to be had; and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon, it shall be lawful for such justices to commit such person to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined; and, in case of such submission, the order of any such justice shall be a sufficient warrant for the discharge of such person."

§ 1320. The Acts which now regulate proceedings with respect to lunatics,² contain no clause enabling magistrates to enforce the attendance of witnesses, either by warrant or fine; and, therefore, in cases under these Acts, the most prudent, if not the only,³ course for the parties to adopt is to summon the witness in the first instance, and, if he refuses to attend, to direct that he shall be

¹ 7 & 8 V., c. 101, § 74; 5 & 6 V., c. 57, § 18.

² 8 & 9 V., c. 100; 16 & 17 V., cc. 96, 97; 25 & 26 V., c. 111.

³ See 2 Burn., Just. 447; Dick., Quart. Sess. 127; Dalt. 441, c. 169, § 6; id. p. 24, c. 6; Evans v. Rees, 12 A. & E. 55; 4 P. & D. 32, S. C.

served with a subpœna, which may be obtained from the clerk of the peace, if the witness lives within the jurisdiction of the justices, or from the Crown Office Department of the Central Office, if he resides in another county.¹

§ 1321. Since the year 1848, several statutes have passed, which § 1190
authorise justices in particular inquiries to compel the attendance of witnesses by summons and warrant, as, for example, the Act of 12 & 13 V., c. 92, § 17, which aims at the more effectual prevention of cruelty to animals. Other statutes, again, adopt the system of fines; and among these may be mentioned "The City of London Sewers Act, 1848,"² which fixes the fine at 20s.³

§ 1322. Notwithstanding the general language of the Acts § 1191
which empower justices to compel the attendance of witnesses by summons and warrant, it is clear that they can, in general, only exercise this power within the limits of their own jurisdiction; and therefore, whenever the witness lives beyond such limits, recourse must be had, either to the cumbrous system of backed warrants,⁴ or at least, of backed summonses,⁵ or the Central Office subpœna, except in the very few instances where, as in the Acts relating to the excise⁶ and customs,⁷ power is expressly given to the justices to issue process beyond their jurisdiction.

§ 1323. A somewhat important provision of the Irish statute, § 1192
1 & 2 W. 4, c. 44, may here be mentioned. § 8 enacts, that it

¹ See *R. v. Lydeard St. Lawrence*, 11 A. & E. 627, per Ld. Denman; *R. v. Greenaway* and *R. v. Carey*, 7 Q. B. 126. It deserves notice, that by 15 G. 3, c. 39, any justice is empowered to administer an oath to any person, when any statute directs a penalty to be levied, or a distress to be made, provided such justice be acting under the authority of such statute; and, possibly, this enactment might be held, by implication, to empower the justice to enforce the attendance of all material witnesses by summons and warrant. 'Sed qu.

² 11 & 12 V., c. clxiii., § 258.

³ For another instance, see 16 & 17 V., c. 112, § 66, *Dublin Hackney Carriage Act*.

⁴ Ante, § 1318.

⁵ Ante, § 1318A.

⁶ 7 & 8 G. 4, c. 53, § 74, empowers the commissioners of excise, the justices, and the commissioners of appeal, to summon any witness, "in whatever part of the United Kingdom he may reside or be."

⁷ 39 & 40 V., c. 36, § 227.

shall be lawful for every court in Ireland, having by law jurisdiction over criminal offences, upon proof being made of the service, either personally, or at the residence of the person required to attend, of any summons to appear and give evidence in such court touching any offence, to impose upon the person so served, in case of his disobeying such summons, such fine as the court shall in its discretion think proper.¹

§ 1324. Several Acts of Parliament give to boards, commis- § 1193
sioners, inspectors, sheriffs, and other officers, more or less stringent powers to enforce the attendance of witnesses before them. Thus, whenever it is necessary for the Board of Customs, or their officers, to institute an inquiry relating to any business under their management, they are empowered to summon any person required as a witness to appear before them and to give evidence on oath; and if such person, having his reasonable expenses tendered to him, refuses to attend, or otherwise misbehaves, he renders himself liable to a penalty of five pounds.² The Local Government Board for England, in whom all the powers of the late English Poor Law Board are now vested,³ the Local Government Board for Ireland,⁴ who now represent the late Irish Poor Law Commissioners, and the General Prisons Board for Ireland, and the Inspectors respectively appointed by these bodies, may summon any person for the purpose of being examined upon any matter under their control, or of producing or verifying any document relating to such matter; and in the event of such person disobeying such summons, or refusing to give evidence, or wilfully altering, suppressing, concealing, destroying, or refusing to produce, any such document, he shall be deemed guilty of misdemeanor: Provided always, that no person shall be required to travel more than ten miles in England, or twenty miles in Ireland, from his place of abode; and if he be summoned by an

¹ See further, as to enforcing attendance of witnesses under The Prevention of Crime (Ireland) Act, 1882, 45 & 46 V., c. 25, §§ 16, 17.

² 39 & 40 V., c. 36, §§ 36, 37.

³ 34 & 35 V., c. 70, § 2.

⁴ 35 & 36 V., c. 69, § 5, Ir.

English inspector, he shall be allowed his expenses.¹ The commissioners and inspectors under the Charitable Trusts Acts of 1853 and 1855,² the Charity Commissioners, and Assistant Charity Commissioners, who now exercise the powers³ originally conferred on the Commissioners and Assistant Commissioners under "The Endowed Schools Act, 1869,"⁴ The Commissioners under "the City of London Parochial Charities Act, 1883,"⁵ the Commissioners and Assistant Commissioners under the Regulation of Railways Act, 1873,⁶ and the inspectors and courts holding investigations under "The Regulation of Railways Act, 1871,"⁷ possess somewhat similar powers for enforcing the attendance of particular witnesses. The Special Commissioners for Irish Fisheries are intrusted with very peculiar powers; and for the purpose of enforcing the attendance of witnesses, and the production of deeds, books, papers, and documents, they have all such rights as the judges of the Queen's Bench in Ireland have for the like purposes.⁸

§ 1325. Again, the Inclosure Commissioners, or any assistant-commissioners, may, by summons, under the seal of the Commission, or under the hand of such assistant-commissioner, require the attendance of witnesses before themselves, or if the summons be under seal, before the valuer; and every such witness, in case of disobedience, or other misconduct in refusing to be sworn or to give evidence, is liable to a penalty not exceeding ten pounds, to be levied and recovered before two justices of the county in which the land to be inclosed is situate; and he will also be deemed guilty of misdemeanor; but he must be paid or tendered the reasonable charges of his attendance, and he need not travel above ten miles from the place of his abode." So, § 1194

¹ 10 & 11 V., c. 109, §§ 11, 21, 26; 29 & 30 V., c. 66, § 7; 10 & 11 V., c. 90, §§ 19, 20 Ir.; 14 & 15 V., c. 68, §§ 16, 17, Ir.; 40 & 41 V., c. 49, § 11, Ir.

² See and compare 16 & 17 V., c. 137, §§ 10—14, and 18 & 19 V., c. 124, §§ 6—9. ³ 37 & 38 V., c. 87, § 1. ⁴ 32 & 33 V., c. 56, § 49.

⁵ 45 & 46 V., c. 36, § 2.

⁶ 36 & 37 V., c. 48, §§ 21, 25.

⁷ 34 & 35 V., c. 78, §§ 4, 7, 11, 15.

⁸ 26 & 27 V., c. 114, § 38, Ir.; amended by 32 & 33 V., c. 92, Ir.

⁹ 8 & 9 V., c. 118, §§ 9, 39, 40, 159, 164. See, also, 41 G. 3, c. 109, §§ 33, 34.

when landowners refuse to treat with commissioners of sewers, these last may issue their warrants to the sheriff to empanel a compensation jury to attend the sessions; and, thereupon, the Clerk of the Peace, or his deputy, shall summon all such persons as shall be thought necessary to be examined as witnesses, who, if they do not appear, or if they refuse to be sworn or to be examined, without lawful excuse to be allowed by the sessions, shall forfeit a sum not exceeding five pounds for every such offence.¹ So, under "The Preliminaries Inquiries' Act, 1851," the inspectors appointed by the Lords Commissioners of the Admiralty are empowered to summon any persons, whose evidence in their judgment shall be material; and if such persons wilfully neglect or refuse to attend in pursuance of such summons, or to produce such documents as they may under the Act to be required to produce, they become liable to a penalty not exceeding five pounds.² So, every special inspector appointed under the Merchant Shipping Act, 1854, may, by summons under his hand, require the attendance of witnesses before him; and every person who refuses to obey such summons, after having his expenses tendered to him, becomes liable to a penalty not exceeding ten pounds.³

§ 1326. Commissioners,⁴ authorised to inquire into the existence of corrupt practices at elections for members of Parliament, may, by a summons under their hands and seals, or under the hand and seal of one of them, require the attendance of witnesses, and the production of such books, papers, deeds, and writings as they may deem necessary;⁵ and if any such summons be disobeyed,

¹ 3 & 4 W. 4, c. 22, §§ 26, 27. § 29 provides by whom the costs of witnesses are to be paid. See 4 & 5 V., c. 45, §§ 13, 14.

² 14 & 15 V., c. 49, §§ 4, 5.

³ 17 & 18 V., c. 104, §§ 15, 432.

⁴ See further as to commissioners empowered to try official persons who have been guilty of offences in India, 24 G. 3, c. 25, §§ 74, 75; 26 G. 3, c. 57; as to examiners appointed to take depositions *de bene esse*, 24 G. 3, c. 25, § 81, and 42 G. 3, c. 85, § 3; and as to commissioners appointed under the Act for regulating the care and treatment of lunatics, 8 & 9 V., c. 100, §§ 100, 101; 25 & 26 V., c. 111, § 46.

⁵ 15 & 16 V., c. 57, § 8; 31 & 32 V., c. 125, §§ 15, 56, continued till 31 Dec. 1884, by 46 & 47 V., c. 51, § 70, Sch. 3.

the commissioners may certify the default to one of the superior courts, who will deal with the offender as if he had disobeyed an ordinary subpoena.¹

§ 1327. Masters in Lunacy may, in the matter of any lunatic, § 1196A compel by summons the attendance of any person to give evidence before them; and every person so summoned must give evidence upon being paid or tendered his reasonable expenses.²

§ 1328. It has already been shown,³ that the High Court and the § 1197 judges thereof are respectively empowered, in any cause or matter where it shall appear necessary for the purposes of justice, to order the attendance of witnesses either before the court or a judge, or any officer of the court, or any person at any place, for the purpose of being examined, or of producing any documents; and the wilful disobedience of any such order may be punished as a *contempt* of court.⁴ Ord. XXXVI. R. 57, also provides, that when an inquiry respecting the amount of unliquidated damages is directed to be had before an officer of the court, "the attendance of witnesses, and the production of documents, before such officer may be compelled by subpoena."

§ 1329. It were an easy task to expand to a tenfold length the § 1198 foregoing summary of the statutes regulating the attendance of witnesses; but it is hoped that what has already been said will, in some measure, serve two purposes. First, it will furnish something like a guide to the practitioner, in ordinary cases, where witnesses are required to be examined; and secondly, it may suggest the expediency of amending the existing law to those who

¹ 15 & 16 V., c. 57, § 12.

² 25 & 26 V., c. 86, § 18; 16 & 17 V., c. 70, § 60.

³ Ante, § 1310.

⁴ See for the Irish Law, 3 & 4 V., c. 105, § 69; 19 & 20 V., c. 102, §§ 51—59. See, also, for the law in the County Courts, 17 & 18 V., c. 125, §§ 53, 54, 60. These sections have been extended to the Cy. Cts. by Ord. of Council, of 18 Nov. 1867. See W. N. of 1867, p. 631.

are able and willing to effect the necessary change. No one can contemplate the infinite variety of forms of proceeding, which must now be resorted to by all inferior courts and functionaries, in order to enforce the attendance of witnesses, without recognising the advantages that would accrue, were the Legislature to pass, as it easily might do, some general Act, which should render the practice on these points clear, simple, and uniform.

§ 1330. In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of the judicial proceeding;¹ but—in common with parties, barristers, solicitors, and, in short, all persons who have that relation to a suit which calls for their attendance,²—they are³ *protected from arrest* upon any civil process, while going to the place of trial, while attending there for the purposes of the cause, and while returning home;⁴ *eundo, morando, et redeundo*.⁵ The service of a subpœna or other process is not necessary in order to afford the witness this protection, provided he has consented to come without

¹ *Seaman v. Netherclift*, L. R., 1 C. P. D. 540; 45 L. J., C. P. 798, S. C.; 46 L. J., C. P. 128, S. C., per Ct. of App.; L. R., 2 C. P. D. 53, S. C.; *Revis v. Smith*, 18 Com. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569; *Kennedy v. Hilliard*, 10 Ir. Law R., N. S. 195; *Gildea v. Brien*, id. 230; *Dawkins v. Ld. Rokeby*, 42 L. J., Q. B. 63, per Ex. Ch.; 8 Law Rep., Q. B. 255, S. C.; 45 L. J., Q. B. 8, per Dom. Proc.; 7 Law Rep., H. L. 744, S. C.; *Goffin v. Donnelly*, L. R., 6 Q. B. D. 307; 50 L. J., Q. B. 303, S. C. In this last case the evidence held to be privileged had been given before a select Committee of the House of Commons.

² The privilege does not apply to a solicitor's clerk attending at Judge's Chambers. *Phillips v. Pound*, 7 Ex. R. 881.

³ Gr. Ev. § 316, slightly as to six lines.

⁴ See Cons. Ord. Ch. 1860, Ord. xlii. r. 1, which provided, that "officers and attendants upon the Court of Chancery, suitors and witnesses, are to have privilege *eundo, redeundo, et morando*, for their necessary attendance, but not otherwise; and when any of them are arrested at such times of necessary attendance, it is a contempt of court." This order is now annulled by Rules of Sup. Ct., 1883, and no rule has been substituted for it.

⁵ *Meekins v. Smith*, 1 H. Bl. 636; *Walpole v. Alexander*, 3 Doug. 45. In *Ex. p. Britten*, 1 Mon. D. & D. 278, the husband of a petitioner, who accompanied his wife to the Court of Review to attend the hearing of the petition, was held to be privileged from arrest; since, being liable to the costs of the application, he had such a relation to the suit as fully justified his attendance.

such service,¹ and actually does attend in good faith;² and therefore, the privilege extends to a witness coming from abroad without a subpoena.³ In determining what constitutes a reasonable time for going, staying, and returning, the courts are disposed to be liberal; and provided it substantially appears that there has been no improper loitering or deviation from the way, they will not strictly inquire whether the witness or other privileged party went as quickly as possible and by the nearest route.⁴

§ 1331. Thus the rule of protection has been held to apply § 1199 where a witness, two hours after he had left the court, was arrested about a mile off in the direct road to his house;⁵ where a defendant, who had attended his cause in the morning, went to a tavern near the court in the afternoon, to dine with his attorney and witness;⁶ where a party had been staying for some days at a coffee-house near the court, waiting for the trial of his cause, which was a remanet, but was not in the list of causes for the day on which the arrest happened;⁷ where a party attending an arbitration was arrested during an adjournment of the reference from one period to another of the same day;⁸ where a witness, in a cause tried on Friday afternoon, was arrested in the assize town on Saturday evening, as she was entering a stage coach which was to convey her home;⁹ where

¹ *Arding v. Flower*, 8 T. R. 536, per Ld. Kenyon; *Ex p. Byne*, 1 Ves. & B. 320; *Rishton v. Nisbett*, 1 M. & Rob. 347, per Alderson and Taunton, Js. But see *Magnay v. Burt*, 5 Q. B. 393, where Tindal, C. J., observed, that the privilege had been disallowed, where the party attended as a volunteer, and not upon process. See, also, *Salk*. 544.

² *Meekins v. Smith*, 1 H. Bl. 637; *Walpole v. Alexander*, 3 Doug. 46, per Ld. Mansfield.

³ *Walpole v. Alexander*, 3 Doug. 45; *Norris v. Beach*, 2 Johns. 294.

⁴ *Strong v. Dickenson*, 1 M. & W. 491, per Ld. Abinger; *Ricketts v. Gurney*. 7 Price, 704, per Graham, B.; *Willingham v. Matthews*, 6 Taunt. 358; 2 Marsh. 57, S. C.; *In re McKone*, Ir. Cir. R. 65; *Smythe v. Banks*, 4 Dall. 329.

⁵ *Selby v. Hills*, 8 Bing. 166. See *Ex p. Clarke*, 2 Dea. & C. 99.

⁶ *Lightfoot v. Cameron*, 2 W. Bl. 1113.

⁷ *Childerston v. Barrett*, 11 East, 439; *Hurt's case*, 4 Dall. 387.

⁸ *Ex P. Temple*, 2 Ves. & B. 395; *Ex P. Russell*, 1 Rose, 278.

⁹ *Holiday v. Pitt*, 2 Str. 986; *Gilb. R.* 308. "There she was directly on her way home. The court did not decide that she might not have been arrested at the assize town on Saturday morning." Per Alderson, B., in *Strong v. Dickenson*, 1 M. & W. 490.

a plaintiff, on leaving court, called at his office for refreshment, and then on his way home went to his tailor's, in whose shop he was arrested;¹ and even where a witness from abroad, on finding that the trial was postponed till the next sittings, determined to wait till it came on, and was arrested on the eighth day after his arrival.²

§ 1332. On the other hand, where a witness subpoenaed out of Chancery, was arrested three days before the time fixed for his examination, while going to his solicitor's office to look at the interrogatories which he would be called upon to answer;³ where a party having come from the country to town to attend an arbitration, remained, after an adjournment of the reference sine die, till the expiration of the fourth day of an approaching term, in the expectation of a motion being made by the opposite party relative to the order of reference;⁴ and where a solicitor, having been arrested during the afternoon at the Auction Mart Coffee House, swore that, having professional business in several causes at Westminster, he went into the City on his way to the courts, but omitted to state either where his house was, or when he left home;⁵—in all these cases the courts have refused to discharge the party out of custody. So, though it seems that a witness who comes to town to be examined, is protected from arrest during the whole time that he *bonâ fide* remains there for the purpose of giving evidence,⁶ a witness living in London is not protected in the interval between the service of the subpoena and the day appointed for his examination.⁷ Neither can the privilege from arrest be prolonged, in consequence of the party's inability to return home for want of pecuniary means,⁸ though possibly, if

¹ *Pitt v. Coomes*, 5 B. & A. D. 1078; 3 N. & M. 212, S. C.; *Luntly v. —*, 1 C. & M. 579; *Ahearne v. M'Guire*, 2 Ir. Eq. R. 437; *Mahon v. Mahon*, *id.* 440.

² *Walpole v. Alexander*, 3 Doug. 45. See, also, *Persse v. Persse*, 5 H. of L. Cas. 671.

³ *Gibbs v. Phillipson*, 1 Russ. & Myl. 19.

⁴ *Spencer v. Newton*, 6 A. & E. 623; 1 N. & P. 818, S. C.

⁵ *Strong v. Dickenson*, 1 M. & W. 488. See *Walsh v. Wilson*, 1 Ir. Eq. R., N. S. 610. ⁶ *Gibbs v. Phillipson*, 1 Russ. & Myl. 19. ⁷ *Id.*

⁸ *Spencer v. Newton*, 6 A. & E. 623; 1 N. & P. 818, S. C.

the detention has been caused by illness, the court will consider this circumstance in fixing the extent of the protection.¹ In one case, where a party in London, being summoned to attend a reference at Exeter, went, three days before the time of meeting, with his attorney to Clifton, where his wife lived, to examine documents necessary to be produced before the arbitrator, and was arrested on the second day before he had completed the arrangement of his papers, the Courts of King's Bench and Exchequer pronounced opposite decisions, the former holding that he was not, the latter that he was, privileged from arrest.²

§ 1333. It would seem that, in general, this protection extends § 1201 only to persons arrested on *civil process*, for against criminal process home itself is no protection.³ An attachment for contempt in disobeying an order of the court made on a solicitor, is not regarded as "civil process," within the meaning of the rule,⁴ though an attachment on an ordinary suitor for non-payment of money will be viewed in that light.⁵ Whether a warrant of commitment issued out of a County Court would be regarded in the light of a criminal process, so as to justify the bailiff in arresting a witness, is a question which, after discussion, has been left undecided by the judges.⁶ In Ireland, where a witness for the Crown, attending at the Quarter Sessions, was arrested under a writ of commission of rebellion, the court out of which the process issued, while declining to express any opinion as to whether this writ was in the nature of a criminal proceeding, discharged the witness from custody, and observed that it was highly essential to the interests of the public,

¹ *Spencer v. Newton*, 6 A. & E. 632; N. & P. 818, S. C.

² *Randall v. Gurney*, 3 B. & A. 252, Abbott, C. J., diss.; *Rickets v. Gurney*, 7 Price, 699, per Graham and Wood, Bs., Garrow, B., diss.

³ Per Ld. Denman, in *re Douglass*, 3 Q. B. 837, 838. It was there held that a warrant issued upon an information *ex-officio*, under the Act of 33 G. 3, c. 52, § 62, and expressed to be to answer for certain misdemeanors whereof the party was impeached, and also for certain penalties sued for by the Att-Gen., was criminal process, under which the party might be taken *redeundo* after discharge from illegal custody.

⁴ In *re Freston*, 52 L. J., Q. B. 545, per Ct. of App.; L. R., 11 Q. B. D. 545, S. C.

⁵ *Id.*, and cases there cited. But see *Harvey v. Harvey*, L. R., 26 Ch. D. 644, per Chitty, J.

⁶ *Kimpton v. Lond. & N. West. Ry. Co.*, 9 Ex. R. 766.

that witnesses in criminal courts of justice should be protected and encouraged.¹ A witness is not privileged from being taken by his bail, even during his attendance at court, for this is not an arrest, but a retaking.²

§ 1334.³ This privilege, so far as parties and witnesses are concerned, will be recognised in all cases where the attendance is given in any matter pending before a *lawful tribunal* having jurisdiction of the cause.⁴ Thus, it has been extended to parties and witnesses attending before an arbitrator, whether he be appointed by an order of the High Court, or of a judge, or by an agreement of reference containing a clause that it may be made a rule of court; for, in all these cases the attendance of witnesses may be enforced.⁵ So, it applies to a party attending at judge's chambers,⁶ or before a Master or an examiner of the High Court,⁷ or at the Registrar's office on passing the minutes of a decree,⁸ or before the under-sheriff on the execution of a writ of inquiry;⁹ as also to witnesses attending the Central Criminal Court,¹⁰ the Court of Bankruptcy,¹¹ Courts-Martial, whether military,¹² marine,¹³ or naval,¹⁴ the Houses of Parliament, or committees of either House.¹⁵ It will also protect a prosecutor attending Quarter Sessions or Assizes,¹⁶ even after the

§ 1202

¹ *Graves v. McCarthy*, *Crawf. & D.*, *Abr. C.* 127.

² *Ex p. Lyne*, 3 *Stark. R.* 132, per *Abbott, C. J.*; *Horne v. Swinford*, 1 *D. & R.*, *Mag. Ca.* 361, per *Richards, C. B.*

³ *Gr. Ev.* § 317, in part.

⁴ *Ex p. Cobbett*, 7 *E. & B.* 959, per *Crompton, J.*

⁵ *Moore v. Booth*, 3 *Ves.* 350, 351; *List's case*, 2 *Ves. & B.* 374; *Ex p. Temple*, *id.* 395; *Randall v. Gurney*, 3 *B. & A.* 252; *Webb v. Taylor*, 1 *Dowl. & L.* 676, per *Patteson, J.*; *Rishton v. Nisbett*, 1 *M. & Rob.* 347; *Spence v. Stewart*, 3 *East*, 89; *Sanford v. Chase*, 3 *Cowen*, 381.

⁶ *Moore v. Booth*, 3 *Ves.* 350, 351; *In re Jewett*, 33 *L. J.*, *Ch.* 730, per *Romilly, M. R.*; 33 *Beav.* 559, *S. C.*

⁷ *Id.*; *Wheeler v. Cox*, 3 *Ir. Law R.*, 302, *n.*; *Brown v. M'Dermott*, 2 *Ir. Eq. R.* 438.

⁸ *Newton v. Askew*, 6 *Hare*, 319.

⁹ *Walters v. Rees*, 4 *Moore.* 34.

¹⁰ *Newton v. Constable*, 2 *Q. B.* 162, per *Coleridge, J.*

¹¹ *Arding v. Flower*, 8 *T. R.* 534; *Ex p. King*, 7 *Ves.* 312; *Ex p. Clarke*, 2 *Dea. & C.* 99; *Ex p. Burt*, 2 *Mon. D. & D.* 666; *Willingham v. Matthews*, 6 *Taunt.* 356; *Andrews v. Martin*, 12 *Com. B.*, *N. S.* 371.

¹² 44 & 45 *V.*, *c.* 58, § 125, subs. 2.

¹³ 44 & 45 *V.*, *c.* 58, § 179.

¹⁴ 29 & 30 *V.*, *c.* 109, § 66.

¹⁵ *May, L. of Parl.* 149—151, and the journals there cited.

¹⁶ *Graves v. M'Carthy*, *Crawf. & D.*, *Abr. C.* 127.

bill in which he is interested has been ignored, provided this fact has not been publicly announced.¹

§ 1335. A witness, too, who attends before a *magistrate* or other inferior judicial officer by virtue of a summons or writ of subpoena, will, it seems, be privileged from arrest on civil process, eundo, morando, et redeundo;² and the same privilege has been extended to a person attending before a police magistrate as a witness on a charge of felony after a remand, though he was not under recognizance or summons to appear.³ But the rule will not protect a common informer, or any person who voluntarily goes before a justice to obtain a summons against another party for penalties, even though the summons be obtained.⁴ In one of the numerous cases respecting Mr. Newton,—who may perhaps claim the unenviable merit of having raised, in his own person, almost as many questions on this subject as all other parties put together,—the judges of the Queen's Bench decided that a barrister was not privileged from arrest, by reason of his attendance at Petty Sessions for the purpose of obtaining practice;⁵ and notwithstanding the case of *Luntly v. —*,⁶ and the Act of 6 & 7 W. 4, c. 14, § 2,⁷ they expressed some doubt as to whether the privilege could be extended further than to protect the bar while attending the Superior Courts, or perhaps such counsel as were actually engaged in professional business before the inferior tribunals. Still, in pronouncing the judgment of the Court, Lord Denman thought proper to observe, that “the attendance of parties and of witnesses has always been protected. It is absolutely necessary for the ends of justice that *their* attendance should be privileged, because, without it, justice cannot be administered. But the

¹ In re M'Kone, Ir. Cir. Rep. 65.

² See *Webb v. Taylor*, 1 Dowl. & L. 684, per Patteson, J.; *Mountague v. Harrison*, 27 L. J., C. P. 24; 3 Com. B., N. S. 292, S. C.; Ex p. Edme, 9 Serg. & R. 147.

³ *Mountague v. Harrison*, 27 L. J., C. P. 24; 3 Com. B., N. S. 292, S. C.

⁴ Ex p. Cobbett, 26 L. J., Q. B. 293; 7 E. & B. 955, S. C.

⁵ *Newton v. Constable*, 2 Q. B. 157.

⁶ 1 C. & M. 579, noticed, 2 Q. B. 165.

⁷ By which persons liable to summary conviction are empowered to make their defence before justices by counsel or solicitors.

protection of legal officers is of a different character, and may well be confined between narrower limits.”¹

§ 1336. Although a party discharged from illegal civil process is privileged from arrest during his return home,² the *discharge from criminal process*, even in consequence of an acquittal, confers no such protection, unless it should appear that the apprehension on the criminal charge was a mere contrivance to get the party into custody in the civil suit.³ A distinction, however, has been drawn in Ireland, between the case of a prisoner actually in custody, and a party out on bail; and it has there been held, that a person who attends under a recognizance to answer a criminal charge, and is acquitted and discharged, is privileged from arrest while returning home.⁴ The validity of this distinction would probably be questioned in the English courts, since an accused, who surrenders to take his trial, is, during that trial, as much in legal custody as a prisoner who is brought up by the gaoler himself. § 1204

§ 1337. If a person entitled to privilege is *unlawfully arrested*, application for his *discharge* should be made, either to the court where the cause is depending, in respect of which the privilege is claimed, or to the court out of which the process issued, upon which the arrest takes place; for this last court ought not to suffer its process to be executed, in violation of the privileges of other tribunals.⁵ Though the one court should, on motion, refuse § 1205

¹ 2 Q. B. 166. See *Jones v. Marshall*, 26 L. J., C. P. 229; 2 Com. B., N. S. 615, S. C.

² *In re Douglas*, 3 Q. B. 837, per Ld. Denman; *R. v. Blake*, 4 B. & Ad. 355; 2 N. & M. 312, S. C.

³ *Goodwin v. Lordon*, 1 A. & E. 378; 3 N. & M. 879; 2 Dowl. 504, S. C.; *Hare v. Hyde*, 16 Q. B. 394; *Anon.*, 1 Dowl. 157; *Buckmaster v. Cox*, 2 Ir. Law Rep. 101; *Jacobs v. Jacobs*, 3 Dowl. 677; *In re Douglas*, 3 Q. B. 838.

⁴ *Callons v. Sherry*, Alc. & Nap. 125; *Kelly v. Barnewall*, Cooke & Alc. 94; *Williams v. Steele*, 4 Law Rec., 1st Ser. 169; *Babington v. Mahony*, 5 Law Rec., 2nd Ser. 232, n.

⁵ *Att.-Gen. v. Skinners' Co.*, 1 Coop. 1; *Kimpton v. Lond. & N. West. Ry. Co.*, 9 Ex. R. 766; *Randall v. Gurney*, 3 B. & A. 252; 1 Chit. R. 679, S. C.; *Ex p. Clarke*, 2 Dea. & C. 99; *Ex p. Burt*, 2 Mon. D. & D. 666; *Walker* (4002)

to interfere, the person arrested may seek relief from the other; ¹ and it would even seem, that, without applying to either of these courts, the arrested party may obtain his discharge by causing himself to be brought by habeas corpus before any one of the superior judges at chambers. ² Indeed this last appears to be the proper course to pursue, whenever the witness has been actually lodged in gaol before the trial, and is made to appear in court by virtue of a writ of habeas corpus ad testificandum. The judge at Nisi Prius will in such case decline to interfere, as he has no means of ascertaining whether any other grounds of detention exist. ³ Inferior tribunals,—such as the Quarter Sessions, ⁴ Arbitrators, ⁵ or the Sheriff's Courts, ⁶—have no power to discharge arrested persons, unless they be arrested in the very face of the court; ⁷ and therefore, if a witness be taken into custody while attending these tribunals, he must have recourse to the superior court out of which the process issued.

§ 1338. In actions depending in the Chancery Division of the High Court, the motion may be made before the Master of the Rolls, though the cause, in attending which the person was arrested, has been set down for hearing in the list of one of the other judges. ⁸ The Houses of Parliament will, of their own authority, respectively discharge all persons duly arrested, while attending before such Houses, or before committees of either House; ⁹ but wit-

§ 1206

v. Webb, 3 Anstr. 941; *Selby v. Hills*, 8 Bing. 166; *Bours v. Tuckerman*, 7 Johns. 538.

¹ *Randall v. Gurney*, 3 B. & A. 255, per Bailey, J.

² Ex. p. *Tillotson*, 1 Stark. R. 470, per Ld. Ellenborough; *Towers v. Newton*, 1 Q. B. 319, 320, per Rolfe, B., after consulting Parke, B. See *Newton v. Constable*, 2 Q. B. 163, n. b.

³ *Astbury v. Belbin*, 3 C. & Kir. 20, per Ld. Campbell.

⁴ *Clerk v. Molineux*, T. Ray. 100; 1 Lev. 159; 1 Sid. 268; 1 Keb. 845, S. C.

⁵ *Walters v. Rees*, 4 Moore, 36.

⁶ Id.; *Wilson v. Sheriffs of London*, Brownl. 1. 1, p. 15.

⁷ *Wilson v. Sheriffs of London*, Brownl. 1. 1, p. 15.

⁸ *Ahearn v. M'Guire*, 2 Ir. Eq. R. 437; *Mahon v. Mahon*, id. 440. But see *Newton v. Askew*, 6 Hare, 321, per Wigram, V.-C.

⁹ May, L. of Parl. 149—151, but the party arrested may apply, if he think fit, to the court out of which the process issued; *Att.-G. v. Skinners' Co.* 1 Coop. 1.

nesses summoned to give evidence before military, marine, or naval courts-martial, must, in the event of their arrest, apply by affidavit for their discharge either to the court out of which the process issued, or if such court be not sitting, to some judge of the Queen's Bench Division in England or Ireland, or to the Court of Session in Scotland, or to the courts of law in the East or West Indies, or elsewhere, as the case shall require.¹

§ 1339. It does not appear to be yet clearly determined, *within* § 1207 *what time* the motion for discharge must be made, or how far the witness arrested may *waive* his protection. In America, where the protection is regarded as a personal privilege, the party arrested may waive it; and if he willingly submits to be taken into custody, he cannot afterwards object to the imprisonment as unlawful.² In Ireland the privilege is considered as bestowed for the good of the public; but there also it has been held, that the application for discharge must be made without delay.³ In this country the courts hold, as in Ireland, that the privilege is not the privilege of the *person* attending the court, but of the *court* which he attends, it being established for the benefit of the suitors and the advancement of justice;⁴ and they, consequently, appear to have considered that a prisoner cannot, by laches, preclude himself from taking advantage of the illegality of his arrest; and that it is immaterial what interval may have been allowed to elapse between the arrest and the application for discharge, unless, perhaps, in a case where the interests of another party have been prejudiced by the delay.⁵ The allowance, however, or the disallowance of the privilege, is always discretionary; it is sometimes, therefore, clogged

¹ See 40 & 41 V., c. 7, § 13; *id.* c. 8, § 18; 29 & 30 V., c. 109, § 66.

² *Brown v. Getchell*, 11 Mass. 11, 14; *Geyer v. Irwin*, 4 Dall. 107.

³ *In re ———*, 3 Ir. Law R. 301.

⁴ *Anon.*, 1 Dowl. 158, per Parke, J.; *Magnay v. Burt*, 5 Q. B. 393, per Tindal, C. J.; *Cameron v. Lightfoot*, 2 W. Bl. 1193, per De Grey, C. J.

⁵ *Webb v. Taylor*, 1 Dowl. & L. 684—687, per Patteson, J. In that case 23 days had elapsed. *Andrews v. Martin*, 12 Com. B., N. S. 372, per Willes, J. There the application was delayed for six months. See *Greenshield v. Pritchard*, 8 M. & W. 148, where after the lapse of a year, the court refused to interfere, though the party had been arrested under void process.

with conditions;¹ and it has been disallowed in collusive, as well as vexatious, actions.²

§ 1340. It is now finally decided that *no action* is maintainable § 1208 against the sheriff or his officer for arresting a person while attending court as a witness; and this, too, though it be alleged and proved that the arrest was made maliciously, and with ample knowledge of the circumstances.³ It is also equally clear, that an action of trespass will not lie against the plaintiff or his solicitor, who in such a case has intrusted the sheriff with the writ;⁴ neither will they be liable to an action on the case, if they have enforced the execution of the process without full knowledge of the privilege of the witness.⁵ Whether the fact of knowledge and the proof of actual malice will make any difference in the position of the parties, may admit of much doubt; for, although it has been held at Nisi Prius, that under these circumstances an action on the case is maintainable,⁶ this ruling is scarcely reconcilable with the doctrines since laid down by the Exchequer Chamber in *Magney v. Burt*.⁷ If a witness, who has been improperly arrested, obtains an order from the court for his discharge, and the sheriff afterwards disobeys this order, an action of trespass may, as it seems, be brought against the officer; for the further detention of the witness, without the authority of any writ to justify it, would become a new trespass and false imprisonment, in the same manner as if there had been a new caption.⁸

§ 1341. Although the witness arrested has no remedy by action, § 1209 the party arresting him maliciously, and with a knowledge of the

¹ *Andrews v. Martin*, 12 Com. B., N. S. 371.

² *Magnay v. Burt*, 5 Q. B. 393; *Cameron v. Lightfoot*, 2 W. Bl. 1193; *Anon.*, 11 Mod. 79.

³ *Magnay v. Burt*, 5 Q. B. 381; 1 D. & M. 652, S. C.; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Tarlton v. Fisher*, 2 Doug. 671.

⁴ *Yearsley v. Heane*, 14 M. & W. 322; *Ewart v. Jones*, id. 774.

⁵ *Stokes v. White*, 1 C. M. & R. 223; 4 Tyr. 786, S. C.

⁶ *Whalley v. Pepper*, 7 C. & P. 506, per Littledale, J. See *Ewart v. Jones*, 14 M. & W. 786, per Pollock, B.: sed qu.

⁷ 5 Q. B. 381; 1 D. & M. 652, S. C. See also, *Vandeveldt v. Lluellin*, 1 Keb. 220

⁸ 5 Q. B. 395, per Tindal, C. J.

existence of his privilege, will not be free from punishment; for he may still have an *attachment* awarded against him for contempt of court.¹ On the same principle, the preventing, or using any means to prevent, a witness duly summoned from attending court, is punishable as a contempt,² and so also is the use of threatening language to any person cognizant of facts in issue in a suit, with the view of preventing him from giving testimony at the hearing.³ Again, any public and calumnious attack on persons who are expected to be witnesses in a pending trial, is a contempt of the highest order as tending to pollute the source of justice;⁴ and any endeavour to intimidate a witness from giving evidence for the Crown in a prosecution, is indictable as a misdemeanor.⁵ It will also perhaps be deemed a contempt, to serve a writ of summons upon a witness in the immediate or constructive presence of the court;⁶ though a writ so served cannot be set aside for irregularity.⁷

¹ *Cameron v. Lightfoot*, 2 W. Bl. 1193, 1194; *Vandevelde v. Lluellin*, 1 Keb. 220; *Magnay v. Burt*, 5 Q. B. 394, per Tindal, C. J.

² *Com. v. Feely*, 2 Virg. Cas. 1.

³ *Shaw v. Shaw*, 31 L. J., Pr. & Mat. 35, per Cresswell, J. O.; 2 Swab. & Trist. 517, S. C.

⁴ *R. v. Onslow & Whalley*, 12 Cox, 358.

⁵ *R. v. Loughran*, 1 Crawf. & D., C. C. 79, per Burton, J. See, also, 27 G. 3, c. 15, § 8, Ir.

⁶ *Cole v. Hawkins*, Andr. 275; 2 Str. 1094, S. C.; commented on in *Poole v. Gould*, 25 L. J., Ex. 250; 1 H. & N. 100, S. C. See, also, *Blight v. Fisher*, 1 Pet. C. C. R. 41; *Miles v. McCulloch*, 1 Binn. 77.

⁷ *Poole v. Gould*, 25 L. J., Ex. 250; 1 H. & N. 99, S. C.

CHAPTER II.

COMPETENCY OF WITNESSES.¹

§ 1342.² ALTHOUGH, in the ordinary affairs of life, temptations to practice deceit may be comparatively few, and therefore men may in general be disposed to rely upon the statements of each other; yet, in judicial investigations, the motives to pervert the truth are so greatly multiplied, that if statements were belived in courts of justice with the same indiscriminating credulity as in private life, much wrong would unquestionably be done. The danger of injustice arising from this cause, which doubtless should induce both judges and juries to watch with cautious suspicion the evidence laid before them, especially when it comes from an interested or polluted source, has, till modern times, been thought to justify the observance of rules, by virtue of which large and numerous classes of persons were rendered incompetent witnesses, and their testimony was uniformly excluded. § 1210

§ 1343. If these rules of exclusion had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature. In rejecting the evidence of parties to the record and other interested witnesses, the law acted on the presumption, not only that such persons, sooner than make a statement which might prejudice themselves, would commit deliberate perjury, but that, if they did so, juries would be incapable of detecting the falsehood. A more baseless calumny upon the veracity of witnesses and the intelligence of juries cannot well be imagined. So, also, § 1211

¹ The question of competency, though involving facts, is one to be determined by the court alone. See ante, § 23.

² Gr. Ev. § 326, in great part, as to first seven lines.

the disqualification of a witness, which followed his conviction of an infamous crime, rested on the equally fallacious assumption, that having been once guilty of a dereliction of duty, he would ever after be regardless of truth, even though he should have no private interest to serve. It is true that in the present century, the palpable injustice which a strict adherence to these rules was found to cause, and the consequent growing disposition of the judges to narrow, as far as possible, their effect, and to convert questions of competency into questions of credibility, occasioned the introduction of many exceptions; still the rules, subject to these exceptions, continued to prevail in our courts of justice, and the very exceptions, which were intended to limit their operation, became in their turn productive of frequent injustice. The difficulty of deciding whether any particular witness fell within the rule or the exception was so great, and the consequences of an erroneous decision were so costly and harassing, that little practical benefit resulted from the change. If, relying on the opinion of the judge that a certain important witness was competent to testify, a party determined upon calling him, and was thus enabled, in the first instance, to establish a just or to resist an unjust, claim, it frequently happened that the court above differed in opinion with the judge who presided at the trial; the consequence of which was that the verdict was set aside without any regard to the real merits of the case, and the party who had obtained it was driven, at a large expense, and to his infinite annoyance, to seek for a second verdict, perhaps equally inconclusive.

§ 1344. Jeremy Bentham, in the reign of Geo. IV., in vain § 1212 undertook to expose the abuses of this system, and ventured to assert that, if the discovery of truth were the end of the rules of evidence, and sagacity consisted in the adaptation of means to ends, the sagacity displayed by the sages of the law in defining these rules was as much below the level of that displayed by an illiterate peasant or mechanic in the bosom of his family, as in the line of physical science, the sagacity shown by the peasant was to that evinced by a Newton.¹ Lawyers wedded to a system, which they

¹ 1 Benth. Ev. 6.

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arrogantly deemed the perfection of reason, listened with impatience to arguments, which, if adopted, would compel them to unlearn the lessons of their youth; while the uninitiated, for the most part, regarded the controversy with indifference, as though, forsooth, it related to a subject in which they had no interest, or else refrained from expressing, if not from forming, an opinion upon matters, respecting which they felt themselves incompetent to decide. The fact is, that, when Mr. Bentham's work on Evidence first made its appearance, the world in general regarded the author as a gentleman who delighted in paradox and wrote bad English, while in the judgment of even the discerning few, this great apostle of judicial reform ranked a little higher than an ingenious theorist. But truth, though long discountenanced, will at length prevail; and thus, by little and little, Mr. Bentham's opinions were at first canvassed, then recognised as correct,¹ and finally, in a great measure, adopted by the Legislature.

§ 1345. The first blow aimed at the old law of incompetency was dealt in the year 1833 by the Act of 3 & 4 W. 4, c. 42, which by §§ 26 and 27² enacted, in substance, that no witness should thenceforth be incompetent to testify in any action, simply because the judgment would be evidence for or against himself; but that, in the event of his being examined, the judgment should not be thus used, and his name should be indorsed on the record so as to furnish proof of his having given evidence.

§ 1346. These sections were, in 1840, re-enacted in an Irish statute;³ and by furnishing a simple method for restoring the competency of witnesses, who were only so far interested in the event of the action, that the record might in a subsequent suit be evidence for or against themselves, they effected a material amendment in the then existing law, and were hailed by the converts to

¹ See 1 Ph. Ev. 42—44, where the arguments for and against the rule which excluded witnesses on account of interest are very fairly stated.

² These sects. were repealed by 37 & 38 V., c. 35.

³ 3 & 4 V., c. 105, §§ 51, 52, Ir.; now repealed by 16 & 17 V., c. 113, § 3, and Sch. A.; and again by 38 & 39 V., c. 66.

Mr. Bentham's philosophy, as the harbingers of a far more extensive change. It was not, however, till the session of 1843 that the hopes of these advocates of reform were destined to be realised, when a bill, brought into the House of Lords by Lord Denman, was after considerable discussion passed into an Act.¹

§ 1347. This Act,—after stating in the preamble that “whereas § 1215 the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony;”—enacts, that “no person offered as a witness shall hereafter be excluded, by reason of *incapacity from crime or interest*,² from giving evidence either in person or by deposition,

¹ 6 & 7 V., c. 85, passed 22 Aug. 1843.

² It deserves notice that progressive changes in the Scotch law of competency have also been effected of late years. In 1840, the Act of 3 & 4 V., c. 59, was passed, which enacts, in § 1, that “it shall, by the law of *Scotland*, be no objection to the admissibility of any witness, that he or she is the father or mother, or son or daughter, or brother or sister, by consanguinity or affinity, or uncle or aunt, or nephew or niece, by consanguinity, of any party adducing such witness in any action, cause, prosecution, or other judicial proceeding, civil or criminal; nor shall it be competent to any witness to decline to be examined and give evidence on the ground of any such relationship.” This was followed in 1852 by the Act of 15 & 16 V., c. 27, which contains, among others, the following enactments:—

§ 1. “No person adduced as a witness in Scotland before any court, or before any person having by law or by consent of parties authority to take evidence, shall be excluded from giving evidence by reason of having been convicted of or having suffered punishment for crime, or by reason of interest, or by reason of agency, or of partial counsel, or by reason of having appeared without citation, or by reason of having been precognosced subsequently to the date of citation; but every person so adduced, who is not otherwise by law disqualified from giving evidence, shall be admissible as a witness, and shall be admitted to give evidence as aforesaid, notwithstanding of any objections offered on the above-mentioned grounds: Provided always, that nothing herein contained shall affect the right of any party in the action or proceeding in which such witness shall be adduced to examine him on any point tending to affect his credibility: Provided, also, that it shall not be competent to adduce as a witness in any action or proceeding any person, who shall at

according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, officer, or the time when he is so adduced as a witness be acting as agent in the action or proceeding in which he is so adduced, excepting in so far as the same may be competent by the existing law and practice of Scotland; and where any person who is or has been an agent shall be adduced and examined as a witness for his client, touching any matter or thing, to prove which he could not competently have been adduced and examined according to the existing law and practice of Scotland, it shall not be competent to the party adducing such witness to object, on the ground of confidentiality, to any question proposed to be put to such witness on matter pertinent to the issue.

§ 2. "It shall be competent to adduce and to examine as a witness as aforesaid in any action or proceeding any party to such action or proceeding, even although individually named in the record or proceeding, unless it shall be shown to the satisfaction of the court, or of the person having authority to take evidence as aforesaid, that such party has a substantial interest in such action or proceeding, and is not merely nominally a party thereto."

In 1853, so much of § 1 of this Act as renders agents incompetent witnesses, and the whole of § 2, were repealed by 16 & 17 V., c. 20, and it was further enacted as follows:—

§ 3. "It shall be competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband and wife of any party, whether he or she shall be individually named in the record or proceeding or not; but nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland; or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any matter communicated by him to her during the marriage.

§ 4. "Nothing herein contained shall apply to any action, suit, or proceeding instituted in Scotland in consequence of adultery or for dissolving any marriage, or for breach of promise of marriage, or in any action of declarator of marriage, nullity of marriage, putting to silence, legitimacy, or bastardy, or in any action of adherence or separation.

§ 5. "The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a reference to the oath of the party so adduced: Provided always, that it shall not be competent to any party, who has called and examined the opposite party as a witness, thereafter to refer the cause or any part of it to his oath, and that in all other respects

person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an *interest in the matter in question, or in the event of the trial* of any issue, matter, question, or injury,¹ or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been *previously convicted of any crime*² or *offence*:³ [Provided that this Act shall not render competent any party to any suit, action, or proceeding, individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make the right of reference to oath shall remain as at present established by the law and practice of Scotland." (As to when such reference may be had, see *Longworth or Yelverton v. Yelverton*, 1 Law Rep., H. L. Sc. 218.)

§ 6. "Nothing herein contained shall alter or affect the authority or practice of the courts in Scotland as to judicial examination."

In 1874 a further change took place in the law. § 4 of the last-named Act was repealed by 37 & 38 V., c. 64, § 1, and it was enacted by § 2 that "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall already have given evidence in the same proceeding in disproof of his or her alleged adultery."

¹ *Sic* in the printed statute. Qu. "*inquiry*."

² Mr. J. Lush is reported to have ruled, that, notwithstanding these words, a person under sentence of death is incapable of being a witness, *R. v. Webb*, 11 Cox, 133. Sed qu. See *R. v. Fitzgerald*, tried in Dublin, 6th Nov., 1884, when Harrison, J., declined to recognise, *R. v. Webb*, as a safe precedent, and admitted the evidence of the convict Delany.

³ Independent of this Act, witnesses are competent, though not compellable, to testify to their own turpitude; as for instance, to admit that their former oaths were corruptly false, *R. v. Teal*, 11 East, 309; *Rands v. Thomas*, 5 M. & Sel. 224; or to prove that notes, to which they had given credit and currency by their signatures, have been fraudulently concocted by them. *Jordaine v. Lashbrooke*, 7 T. R. 601, overruling *Walton v. Shelley*, 1 T. R. 296. In fact, the maxim of the civil law, "*nemo allegans suam turpitudinem est audiendus*," is not recognised in English courts of justice: and the decisions of Jefferies, C. J., and Legge, B., who are both reported to have rejected witnesses, when called to prove that they had perjured themselves on some former occasion, are no longer of any authority. See *Titus Oates*'s case, 10 How. St. Tr. 1185, 1186; and *Eliz. Canning*'s case, 19 How. St. Tr. 632.

cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part,¹] or [the husband or wife of such persons respectively;²] Provided also that this Act shall not repeal any provision [in the New Will Act]:³ Provided that in Courts of Equity any defendant to any cause pending in any such court, may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant, so to be examined, may have in the matters, or in any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting, or tending to affect, the credit of such defendant as a witness."

§ 1348. It will be seen that, by the provisoes here introduced, § 1216 some few exceptions were engrafted on the general rule, that no interested witness should be incompetent to give evidence; and so far the triumph of Mr. Bentham's proposition, that "in the character of objections to competency no objections ought to be allowed,"⁴ failed to be complete. A brighter prospect, however, was soon about to dawn; and in 1846, the Legislature,—while establishing the County Courts by the Act of 9 & 10 V., c. 95,—had the courage to enact, that "on the hearing or trial of any action, or on any other proceeding under this Act, the parties thereto, their wives and all other persons, may be examined either on behalf of the plaintiff or defendant, upon oath or solemn affirmation."⁵ After the wisdom of this great alteration in the law had been tested and thoroughly proved by the experience of five years, a final effort was

¹ The words within brackets were repealed by 14 & 15 V., c. 99, § 1. See post, § 1349.

² The words within brackets were repealed by 16 & 17 V., c. 83, § 4. See post, § 1352.

³ 7 W. 4 & 1 V., c. 26, §§ 14—17.

⁴ 1 Benth. Ev. 3.

⁵ § 83. See also 6 & 7 W. 4, c. 75, § 36, and 14 & 15 V., c. 57, § 102, which enabled parties to appeal to the oaths of their opponents in the Irish Civil Bill Courts.

made by Lord Brougham to induce Parliament to carry out the principle to its legitimate extent. This effort was crowned with almost entire success; and the statute 14 & 15 V., c. 99, having received the Royal assent in August, 1851, came into operation in the following September.¹

§ 1349. The first three sections of this Act, which relate to the competency of witnesses, are as follows:—

“I. So much of § 1 of the Act of 6 & 7 V., c. 85, as provides that the said Act shall ‘not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may

¹ § 20. This statute was prepared by the author of the present work, who originally submitted it to Ld. Denman, and after obtaining his sanction to the alterations proposed, intrusted it to Ld. Brougham. It was first introduced into the House of Lords in 1849, but it was not pressed forward during that or the following year, in consequence of the threatened opposition of Sir J. Jervis, the then Whig Attorney-General.

As attempts have been made in some quarters to deprive the author of the credit claimed by him in this note, he has thought it right, in self-defence, to publish an extract from a characteristic letter written to him by Lord Brougham, which, it is hoped, will appease the Demon of Detraction, and settle the question for the future. The extract is as follows:—“My dear P. T. —1000 congratulations. I have also congratulated A.-G.” [that is, Sir A. Cockburn, the then Att.-Gen., who promoted the Bill in the Commons], “and he deserves great credit. He has done it manfully. But really, after all, I regard *You* as the Legislature on this occasion, and so you ought to be considered. The letter of Denman, in which he extolled you” [this refers to a letter he had mentioned in a former note], “was in answer to one from me saying that, if we succeeded, we owed it to you—your learning and zeal, judgment and perseverance,—in which he fully agreed. It is really a solid victory, and I think we must now (*i. e.*, after it is passed on Monday, and also after the amendments are swallowed by Jonathan” [Lord Chancellor Truro,] “and Cranworth—or given up by the Com.,—till then we are not safe), begin to show what has not yet been AT ALL made known,—(I wrote from Cannes warning against prematurely disclosing what would do—the Bill),—I mean the revolution it will make in judicature, and even in jurisprudence,—as well as in the moral condition of society.”

be brought or defended, either wholly or in part,' is hereby repealed."¹

"II. On the trial of any issue joined, or of any matter or question, or any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, *except* as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

"III. But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself,² or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

¹ It will be observed that this section repeals the whole of the first proviso in § 1 of Ld. Denman's Act, excepting the words at the end of it, "*or the husband or wife of such persons respectively.*" These words are repealed now by 37 & 38 V., c. 96, and also by 16 & 17 V., c. 83, § 4.

² The proviso contained in this last line and a half was most injudiciously introduced into the Act by the House of Lords at the pressing instance of Ld. Truro. As Ld. Campbell pointed out at the time, it is merely calculated to raise doubts where none should exist. By the general law of the land, *every witness* is protected from answering questions, where the answer would tend either to criminate himself, or to expose him to any penalty, forfeiture, or ecclesiastical censure; and as the Act simply makes parties witnesses, it is obvious that, without any special enactment, they might have claimed the same protection as all other persons under examination. But how stands the matter now? the Act states that they cannot be forced to criminate themselves. Good; but can they be compelled to disclose what will render them liable to penalties, forfeitures, or spiritual reprimands? Is the maxim, "*expressum facit cessare tacitum*," to apply, or can the party give the go-by to the statute, and rest on the common law?

The 4th Section ran thus:—"Nothing herein contained shall apply to any action, suit, proceeding, or bill, in any court of common law, or in any ecclesiastical court, or in either House of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage."¹

§ 1350. Although at the time when these sections first came § 1218 into operation, learned judges might have been found, who, taking a cautious view of the subject, were inclined to regard the examination of parties as a questionable, if not a very dangerous, experiment; it is believed, that, at present, every eminent lawyer in the United Kingdom will most readily admit, that this change in the law has been productive of highly beneficial results. In courts of law, it has not only enabled very many honest persons to establish just claims, which, under the old system of exclusion, could never have been brought to trial with any hope of success; but it has deterred at least an equal number of dishonest men from attempting, on the one hand, to enforce a fraudulent demand, and, on the other, to set up a fictitious defence. The knowledge that a party might tell his own story to the court and jury, has operated strongly as an encouragement to the suitor who was the witness of truth; while the dread of cross-examination, and consequent exposure, has had a corresponding tendency to check litigation, in cases where a verdict could only be obtained through the medium of perjury. In Courts of Equity the same advantages have arisen, so far as respects the power now first granted to parties of giving testimony in their own favour; while defendants, who, under the former law, would have been forced to file cross bills for the purpose of "scraping the conscience" of plaintiffs, have been enabled to effect that desirable object without having recourse to this dilatory and costly proceeding. The Common Law Commissioners have expressed an opinion most favourable to the merits of the measure, observing in their second Report,² that "according to the concurrent testimony of the bench, the profession, and the public, the new law is found to work admirably, and to contribute in an eminent

¹ This sect. was repealed by 32 & 33 V., c. 68, § 1. See post, §1355.

² P. 11.

degree to the administration of justice;" and these sentiments have been confirmed by a Parliamentary avowal, in which it is declared that "the discovery of truth in courts of justice have been *signally* promoted by the removal of restrictions on the admissibility of witnesses."¹

§ 1351. On the one point the Act of 1851 was essentially defective; § 1219 for although it rendered husbands and wives admissible witnesses for or against each other, when both were *jointly parties* as plaintiffs or defendants,² it did not further interfere with the common law rule, which—except in the County Courts,³ the Barmote Courts of Derbyshire,⁴ and the Court of Bankruptcy,⁵—precluded either the husband or the wife from giving testimony in a cause in which the other was a party. This defect in the measure, which owed its existence to the unyielding opposition of Lord Chancellor Truro, and the cautious misgivings of Lord Cranworth, was soon found to be productive of much practical injustice; and an attempt was accordingly made to get rid of the difficulty, by putting a forced interpretation upon the language of the statute. The attempt failed, as it deserved to do;⁶ and Lord Brougham once more had recourse to the Legislature. The Evidence Amendment Act of 1853⁷ was passed with universal consent, and the law which governs the admissibility of the testimony of married persons, was thus placed on a tolerably sound footing.

§ 1352. The first four sections of that Act are as follows:— § 1219A

"I. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the

¹ 32 & 33 V., c. 68.

² *Stokehill and Wife v. Pettingell*, 21 L. J., Q. B. 249, n.

³ 9 & 10 V., c. 95, § 83, cited ante, § 1348.

⁴ 14 & 15 V., c. 94, § 18.

⁵ See the Repealed Act, 12 & 13 V., c. 106, § 118.

⁶ *Stapleton v. Crofts*, 18 Q. B. 367; *Barbet v. Allen*, 7 Ex. R. 609.

⁷ 16 & 17 V., c. 83.

persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

"Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, [or in any proceeding instituted in consequence of adultery.]"¹

"III. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

"IV. So much of" § 1 of 6 & 7 V., c. 85, "as provides that the said Act shall not render competent the husband or wife of any party to any suit, action, or proceeding, individually named in the record, or of any lessor of the plaintiff, or of the tenant of premises sought to be recovered in ejectment, or of the landlord or other person in whose right any defendant in replevin may make cognizance, or of any lessor in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed."

§ 1353. The least justifiable of all the exceptions engrafted on § 1220 the Evidence Amendment Act of 1851, was that which related to actions for breach of promise of marriage. This exception was not to be found in the original draft of the Bill, but was the result of over-caution while the measure was before the House of Lords. From the first the expediency of excluding the testimony of parties to such actions was regarded by the promoters of the Bill as extremely problematical; and they who afterwards watched the working of the new law were not slow in coming to the conclusion, that

¹ The words within brackets were repealed by 32 & 33 V., c. 68, § 1. See post, § 1355.

actions of this nature were precisely those in which juries ought to have the advantage of seeing the litigants, and of bearing what they might have to say on either side. The repeal, therefore, of the obnoxious exception was only a question of time, and at length, in 1869, it was effected with general approval, principally through the exertions of Mr. Justice Denman.¹ In order, however, to guard against the fancied danger of jurymen being biassed by the charms or wiles of the gentler sex, the Act in question,—after specially enacting that “the parties to any action for breach of promise of marriage shall be competent² to give evidence in such action,”—goes on to provide, that no plaintiff in any such action “shall recover a verdict, unless his or her testimony shall be *corroborated*,” not by ‘trifles light as air,’ but—“by some other *material* evidence in support of such promise.”³

§ 1354. When the Evidence Acts of 1851 and 1853 were respectively before Parliament, it was not surprising that the Legislature determined to exclude from their operation the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties. Obvious reasons would occur to any man, why defendants in these suits should not be exposed to the almost irresistible temptation of committing perjury;⁴ and their exclusion

§ 1221

¹ 32 & 33 V., c. 68, § 1.

² By Ld. Brougham's Act, they are also “compellable” to give evidence, see ante, § 1349.

³ 32 & 33 V., c. 68, § 2. See *Hickey v. Campion*, I. R., 6 C. L. 557; *Bessela v. Stern*, L. R., 2 C. P. D. 265, per Ct. of App.; 46 L. J., C. P. 467, S. C.

⁴ See on this subject the powerful observations of Ld. Denman (then Mr. Denman), in Queen Caroline's trial:—“We have been told,” said he, “that Bergami might be produced as a witness in our exculpation, but we know this to be a fiction of lawyers, which common sense and natural feeling would reject. The very call is one of the unparalleled circumstances of this extraordinary case. From the beginning of the world no instance is to be found of a man accused of adultery being called as a witness to disprove it. * * * How shameful an inquisition would the contrary practice engender! Great as is the obligation to veracity, the circumstances might raise a doubt in the most conscientious mind whether it ought to prevail. Mere casuists might dispute with plausible arguments on either side, but the natural feelings of mankind would be likely to triumph over their moral doctrines. Supposing the existence of guilt, perjury itself would be thought venial in comparison with the exposure of a confiding woman. It follows that no such question ought in any case to be administered, nor such temptation

from the witness-box seemed at that time to afford the only safe mode of avoiding such a result. In the year 1857, however, when the law of divorce was amended, doubts were caused by the obscure language of the amending statute,¹ as to how far the old doctrines of the common law in relation to the competency of witnesses were to be recognised in the New Divorce Court. These doubts gave rise to fresh legislation, which in its turn gave rise to fresh doubts and difficulties.²

§ 1355. At length, in 1869, Mr. Justice Denman carried through § 1221 Parliament a measure,³ which is supposed by many lawyers to have made the law what it ought to be. After repealing the 4th section of the Act of 1851, and so much of the 2nd section of the Act of 1853, "as is contained in the words 'or in any proceeding instituted in consequence of adultery,'" it proceeds to enact, in § 3, as follows:—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent⁴ to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."⁵ The language used in this proviso, though not free from ambiguity, will not protect a party, who tenders himself as a witness for the purpose of disproving one act of adultery, from being cross-examined respecting other acts, provided that these last be duly charged in the pleading.⁶ Neither does the statute render inadmissible the evidence of a witness that

given to tamper with the sanctity of oaths." Quoted in 1 Ld. Brougham's Speech. 248.

¹ See and compare 20 & 21 V., c. 85, §§ 41, 43, 46, and 48.

² See Acts and cases cited in 5th ed. of this work, §§ 1220 B, 1220 C, 1220 D.

³ 32 & 33 V., c. 68.

⁴ By Ld. Brougham's Acts they are also "compellable" to give evidence, see ante, §§ 1349, 1352.

⁵ See ante, § 1347, n. 2, ad fin. as to the Scotch law.

⁶ *Brown v. Brown & Paget*, 3 Law Rep., P. & D. 198; 43 L. J., Pr. & Mat. 33, S. C.

he or she has committed adultery, but it simply protects the witness from being questioned on the subject in the event of the protection being claimed.¹ No one but the witness has any right to interfere.²

§ 1356. Regard being had to such of the exceptions specified in the Acts of 1851 and 1853, as are still in force, and a reference being also made to certain other legal rules, which will presently be mentioned, the law will be found to treat *four classes* of persons as generally *incompetent* to testify; namely, first,³ those persons who, in any criminal proceeding, are charged with the commission of any indictable offence, or any offence punishable on summary conviction, so far at least as relates to their giving evidence on oath either for or against themselves; secondly,⁴ the husbands and wives of persons, who are defendants in any criminal proceeding; thirdly, in cases of high treason and misprision of treason, other than such as consists in injury or attempting to injure the Queen's person,⁵ those persons who are not included, or properly described, in the list of witnesses delivered to the defendant pursuant to statute;⁶ and lastly, persons devoid of sufficient understanding to know what they are about.⁷ On the first and second of these general rules a few exceptions have been engrafted, which will be noticed in their proper places. § 1222

§ 1357. The *first class* of persons whom the law in general regards as partially incompetent to testify, includes defendants in our criminal courts, and parties charged before magistrates with minor offences. It has been seen that Lord Brougham's Act of 1851, in making parties to the record admissible witnesses, has expressly provided in § 3,⁸ that nothing in the Act "shall render any person, who in any criminal proceeding is charged with the § 1223

¹ *Hebblethwaite v. Hebblethwaite*, 39 L. J., Pr. & Mat. 15; 2 Law Rep., P. & D. 29, S. C.; *Babbage v. Babbage*, 2 Law Rep., P. & D. 222.

² *Hebblethwaite v. Hebblethwaite*, 39 L. J., Pr. & Mat. 15; 2 Law Rep., P. & D. 29, S. C. ³ Post, § 1357.

⁴ Post, § 1362.

⁵ See 39 & 40 G. 3, c. 93; 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V., c. 51, § 1; ante, § 958.

⁶ 7 A., c. 21, § 11; post, § 1373.

⁷ Post, § 1375.

⁸ Ante, § 1349.

commission of any *indictable* offence, or any offence *punishable on summary conviction*, competent or compellable to give evidence for or against himself or herself." Now this proviso calls for three observations. In the first place, it does not say that the persons specified in it shall not be rendered by the Act competent or compellable to give evidence *at all*, but merely that they shall not be allowed or forced to testify *for or against themselves*. In the event, therefore, of several persons being jointly indicted, it would seem to be no unreasonable proposition to contend, that any one of them might, under § 2, be called as a witness either for or against his co-defendants, excepting only in those few cases, where the indictment was so framed as to give him a direct interest in obtaining their discharge. Indeed, for some years this was considered to be the law by many judges,¹ though some doubted;² and at last in 1872, on the point being reserved for the Court of Criminal Appeal, that Court, after much discussion, decided that Lord Brougham's Act was not intended to alter, and did not in fact alter, the ancient law of England, which prohibited any attempt to examine or cross-examine any prisoner on his trial.³ Whenever, therefore, it becomes necessary to obtain the testimony of a defendant in a criminal trial as against his co-defendants, the proper course,—unless he has pleaded guilty on his arraignment and is therefore not given in charge to the jury,⁴—is either to enter a *nolle prosequi*,⁵ or to apply for a verdict of acquittal before opening the case;⁶ though the court in its discretion, will direct an acquittal either during the progress or at the termination of the inquiry, if no evidence has been given inculpating the party who is sought to be made a witness.⁷ As soon as a prisoner has been thus acquitted he becomes competent to testify, either for the crown, or for his former co-

¹ See *R. v. Deeley*, 11 Cox, 607, per Mellor, J.; *R. v. Stevenson & Coulter*, per Ball, J., at Armagh, on 4 March, 1851; The indictment in this last case was for an aggravated assault, and Coulter was examined as a witness for Stevenson, M.S. See, also, *Winsor v. R.*, 35 L. J., M. C. 161; 7 B. & S. 490; 1 Law Rep., Q. B. 390, S. C.; 10 Cox, 276, S. C. nom. *R. v. Charlotte Winsor*.

² See *R. v. Jackson*, 6 Cox, 525.

³ *R. v. Payne*, 41 L. J., M. C. 65, per 16 Judges; 12 Cox, 118, and 1 Law Rep., C. C. 349, S. C.

⁴ *R. v. Gallagher*, 13 Cox, 61.

⁵ *R. v. Sherman*, Cas. temp. Hardw. 303; *R. v. Ellis*, 1 M'Nally, Ev. 55.

⁶ *R. v. Rowland*, Ry. & M. 401, per Abbott, C. J.

⁷ *R. v. Fraser*, 1 M'Nally, Ev. 56; *R. v. O'Donnell*, 7 Cox, 337.

defendants.¹ In the recent case of *R. v. Bradlaugh*, where three persons were indicted jointly for publishing blasphemous libels, but one of them, under special circumstances, was put separately on his trial, he was allowed to call the other two defendants as witnesses on his behalf, though they still remained liable to be tried for the same offence after him.²

§ 1358. The second point which it is important to notice with respect to the proviso in question, is that it merely applies to persons who are charged in any *criminal* proceeding, either with *indictable* offences, or with offences punishable by *summary convictions*. Penal proceedings instituted in the Ecclesiastical Courts do not fall within either of these two categories; and, consequently, if the office of the judge be promoted against a clergyman for immoral conduct, the defendant will be competent to testify in his own behalf, and may even be subjected to examination on the part of the prosecution.⁴ It may be true that he cannot be compelled to answer any questions tending to expose him to conviction, though this is a point on which, as before observed,⁵ some doubt may possibly be entertained; but should he rely on his legal protection and decline to answer, the inference against him raised by such conduct must of necessity be strong.⁶ It is equally obvious that *qui tam* actions for penalties,—although to a certain extent they partake of a penal character,—are not included in the language of the proviso; and the defendants in such actions may therefore be examined on either side. The same remark applies to many charges preferred before

§ 1224

¹ *R. v. O'Donnell*, 7 Cox, 341, 342, per Monahan, C. J.

² 15 Cox, 217.

³ These words apply to an information against a party under 1 & 2 W. 4. c. 32, § 23, for using snares to take game, not having a game certificate. *Cattell v. Ireson*, 27 L. J., M. C. 167; E. B. & E. 91, S. C. Also to a summons before Petty Sessions, to enforce a penalty for keeping a dog without a licence, contrary to the Dogs' Regulation, Ireland Act, 1865; *R. v. Sullivan*, I. R., 8 C. L. 404. Also to a summons to find sureties for good behaviour, *R. v. Cork Js.*, 15 Cox, 149, Ir. C. C.; S. C. nom. *R. v. Queen's Cy. Js.*, re Feehan, 10 L. R., Ir. 294.

⁴ *Bp. of Norwich v. Pearse*, 37 L. J., Ec. C. 90; 2 Law Rep., Adm. & Ecc. 281, S. C., per Sir R. Phillimore, overruling *Burder v. O'Neill*, 9 Jur., N. S. 1109; 2 New R. 551, S. C., per Dr. Lushington. See, also, *Berney v. Bp. of Norwich*, 36 L. J., Ec. C. 10, per Pr. C.

⁵ See ante, p. 1145, n. 2.

⁶ *Att.-Gen. v. Radloff*, 10 Ex. R. 98, per Martin, B.; 107, per Parke, B.

justices, which, although in one sense they may be regarded as criminal proceedings, do not result in summary convictions. Among these must be mentioned applications for orders of affiliation;¹ and it is certainly not the least important benefit conferred by the Act, that men have now an opportunity afforded them of defeating the false accusations of unscrupulous and designing women.²

§ 1359. As serious doubts have been entertained, whether an information filed by the Attorney-General for the recovery of penalties consequent on a breach of the revenue laws, was, or was not, such a "criminal proceeding" as to render the defendant an inadmissible witness,³ the Legislature has *five* times interposed with the view of clearing up the matter by positive enactment. The first two attempts⁴ failed from want of competent skill in the draughtsman.⁵ The third only partially succeeded;⁶—but, on the fourth occasion an Act was passed,⁷ which would seem to have settled the point by enacting affirmatively, that the Evidence Acts of 1851 and 1853⁸ shall extend to proceedings at law on the Revenue Side of the Queen's Bench Division, and by enacting negatively, that such proceedings "shall not be deemed criminal proceedings" within the meaning of the said Acts. However, this language was still deemed insufficient, and consequently, in 1876, a fifth statute declared, that where any proceedings are had under the Customs Acts in the Queen's Bench Division on the Revenue Side, "the defendant shall be competent and compellable to give evidence."⁹ It is hoped that the question may be now allowed to rest.

§ 1360. Notice should here be taken, that whenever, pursuant to § 1225A

¹ *R. v. Berry*, Bell, CC. 46, 59; *R. v. Lightfoot*, 6 E. & B. 822.

² See ante, § 964.

³ *Att.-Gen. v. Radloff*, 10 Ex. R. 84. Pollock, C. B., and Parke, B., held that the defendant was not a competent witness; Platt and Martin, Bs., held that he was.

⁴ 17 & 18 V., c. 122, § 15; 18 & 19 V., c. 96, § 36; repd. by 28 & 29 V., c. 104, § 33.

⁵ See § 1225 of 2nd Ed. of this work.

⁶ 20 & 21 V., c. 62, § 14; repd. by 28 & 29 V., c. 104, § 33.

⁷ 28 & 29 V., c. 104, § 34.

⁸ 14 & 15 V., c. 79; 16 & 17 V., c. 83.

⁹ 39 & 40 V., c. 36, § 259.

the custom of the Navy, a court-martial is held to inquire into the cause of the wreck, loss, destruction, or capture of one of her Majesty's ships of war, and no specific charge is made against any officer, seaman or other person in the fleet, all or any of the crew may, upon their trial, "give evidence on oath or affirmation before the court touching any of the matters then under inquiry," but no such person "shall be obliged to give any evidence which may tend to criminate himself."¹ Again, under "The Merchant Shipping Act, 1876," any person, who is charged with the misdemeanor of sending a ship to sea in an unseaworthy state so as to endanger life, is empowered, in self-defence, to give evidence in the same manner as any other witness."² So, if criminal proceedings be taken in respect of an offence under either of the Mines Regulation Acts of 1872, the owner, agent, or manager of any coal mine, and the owner or agent of any metalliferous mine, "may, if he think fit, be sworn and examined as an ordinary witness in the case, where he is charged in respect of any contravention or non-compliance by another person."³ So, on the prosecution of any person for an offence against the Act for preventing accidents by Threshing Machines, "he may, on his own application, be sworn and examined as a witness."⁴ So, also, if any person be charged under the Army Act, 1881, with illegally purchasing from a soldier any regimental necessaries, equipments, or stores, such person, "and the wife or husband of such person, may, if he or she think fit, be sworn and examined as an ordinary witness in the case."⁵ So, on any prosecution under "the Corrupt and Illegal Practices Prevention Act, 1883," "whether on indictment or summarily, and whether before an election court or otherwise, and in any action for a pecuniary forfeiture under the Act, the person prosecuted or sued, and the husband or wife of such person may, if he or she think fit, be examined as an ordinary witness in the case."⁶ So, in all cases of summary proceedings,

¹ 29 & 30 V., 109, § 62. Under these provisions, when a Court Martial was held in Nov., 1871, respecting the loss of the *Megara*, Captain Thrupp was enabled to give evidence on oath, and was thereupon honourably acquitted.

² 39 & 40 V., c. 80, § 4.

³ 35 & 36 V., c. 76, § 63, r. 4; and c. 77, § 34, r. 4.

⁴ 41 & 42 V., c. 12, § 3.

⁵ 44 & 45 V., c. 58, § 156, subs. 3.

⁶ 46 & 47 V., c. 51, § 53, subs. 2; continued till 31st Dec., 1885, by 47 & 48 V. c. 53; and applied to prosecutions under 47 & 48 V. c. 70, by § 30 of that Act.

either under the Licensing Act, 1872,¹ or under "the Sale of Food and Drugs Act, 1875,"² the defendant and his wife shall be competent to give evidence. So, upon the hearing of any indictment or information under §§ 4, 5 and 6 of the Conspiracy and Protection of Property Act, 1875, the respective parties to the contract of service, their husbands and wives, shall be deemed competent witnesses.³ So, under the Act of 40 & 41 V., c. 14, "on the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a *civil right* only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence."⁴

§ 1361. The Third observation suggested by the proviso in Lord Brougham's Act is, that it does not render the persons specified incompetent to testify either for or against themselves,—for the Act is in no respect a *disqualifying* statute,—but it simply leaves untouched the previous law on the subject. In whatever cases, therefore, previous to the passing of the Act, defendants charged with offences were rendered competent to give evidence, they may still, notwithstanding the proviso, be examined as witnesses. The principal statutes which authorise such an examination, will be found to relate to cases in which the defendant is either a nominal party on the record, or is only one of many persons against whom the proceeding is really instituted. § 1226

§ 1361A, During the last few years the rule of exclusion discussed in the last five sections, and also that illustrated in §§ 1362 to 1371, which shuts out the testimony of the wives or husbands of persons charged with crime, have been regarded by the public with increasing disfavour. Enlightened law-reformers have long been aware that these two rules are essentially unjust; and that

¹ 35 & 36 V., c. 94, § 51, y. 4.

³ 38 & 39 V., c. 86, § 11.

² 38 & 39 V., c. 63, § 21.

⁴ § 1.

no greater boon could be conferred on an innocent man, who should unfortunately be exposed to a penal prosecution, than to enable him to state his own case on oath, and to call his wife to confirm his testimony. Still, this wise doctrine "was caviare to the general;" an unreasoning contempt of the "French system;" a dogged clinging to what Britons are pleased to fancy is "fair play;" and a general inability in the non-legal mind to discriminate clearly between "may" and "shall,"—between the rendering a man competent to give evidence, and the making it imperative on him to do so,—these reasons have hitherto prevented our legal procedure from being moulded into the form, which modern intelligence and modern humanity alike demand. In the present session of Parliament,¹ however, two attempts have been made, one in the Upper House by Lord Bramwell, and the other in the Commons by the Attorney-General, to place the law on a proper footing, and to allow every defendant in a criminal proceeding, or the wife or husband of every defendant, *if such defendant thinks fit*, to be sworn and examined as an ordinary witness. One or the other of these bills would almost certainly have become law, had not the Session been brought to an untimely end, in consequence of what Liberals have denounced as the haughty obstinacy of the Lords, and Conservatives have censured as the arrogant petulance of the Prime Minister. Be that as it may, the opportunity for effecting a very valuable reform in English law has unfortunately for the present been lost, and, in these days of obstruction, who can venture to predict when another occasion, equally favourable, shall be afforded for perfecting this work?²

§ 1361b. In the meanwhile it may here be convenient to state for the guidance of the profession, that, at a meeting of all the Judges liable to try prisoners, which was held under the presidency of

¹ 1884.

² The author suggests for consideration, that in any future Bill on this subject a clause should be inserted, somewhat to the following effect. "When any person so charged, or the wife or husband of such person, is a witness, the court, in its discretion, may disallow any question put in cross-examination, which appears to it to be vexatious, irrelevant, or otherwise improper. The discretion of the court under this section shall be final."

Lord Coleridge on the 20th of November, 1881, a resolution was passed by nineteen votes against two,¹ "That in the opinion of the Judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence." The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing-up of the judge, when their counsel have already spoken in their favour, was then considered, and after some discussion was adjourned for further consideration.

§ 1362. The *second general rule of exclusion*,—subject to some § 1227
few exceptions, which are elsewhere mentioned,²—precludes husbands and wives from giving testimony for or against each other in any criminal proceeding.³ This is the common-law rule, which has not been interfered with either by the Act of 1851, or by the Act of 1853. Both statutes contain an express proviso, that, nothing therein shall "render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding."⁴ The object of the proviso in the first-named Act has been much misunderstood by the judges.⁵ Mr. Baron Parke observed, with characteristic prudence, that the clause was introduced "perhaps unnecessarily." Mr. Baron Martin, more bold, treated it as an obvious error; while Sir Frederick Pollock and Mr. Justice Crompton were willing to consider that "it was inserted *ex majori cautela*." Thus far the judges; but, in point of fact, there was no error or needless caution in the matter. As the bill originally stood, the clause was obviously necessary,

¹ The two dissentients were Stephen and Hawkins, Js.

² See ante, § 1360, and post, §§ 1371, 1371A, 1372.

³ In India the law is otherwise. § 120 of the Ind. Ev. Act, 1872, enacts, that "in criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."

⁴ 14 & 15 V., c. 99, § 3; 16 & 17 V., c. 83, § 2.

⁵ See *Barbat v. Allen*, 7 Ex. R. 615, 616; *Stapleton v. Crofts*, 18 Q. B. 367; *Kernot v. Pittis*, 2 E. & B. 425.

because husbands and wives were made competent witnesses. The enactment, however, to that effect, after having been struck out in the Upper House and re-inserted by the Commons, met with so strenuous an opposition when the bill was returned to the Lords, that it was withdrawn at the last moment. The Act, therefore, finally passed in a form which left the law of husband and wife precisely where it found it,—excepting only in those few cases where both of them are either parties to the record, or persons in whose behalf the action is brought or defended. Whenever this state of things occurs, the wife, as a party, or an interested person, may, under the express terms of the second section, give evidence for or against her husband, and the husband, in like manner, may give evidence for or against his wife; and it was merely because a man and his wife are sometimes both of them *parties* to the same indictment or other criminal proceeding, that the clause prohibiting them, under such circumstances, from testifying for or against each other was *retained* in the Act, although the general enactment respecting husbands and wives was struck out. Were it not for this clause, a wife, conjointly indicted with her husband for murder, might be called by the prosecutor to establish the man's guilt, or the man might be examined by the counsel for the defence to prove the woman's innocence.

§ 1363. Returning now to the rule itself, it will be found not only to exclude the husband or wife of a defendant in a criminal proceeding, who is called to give evidence of what occurred during their marriage, but to prevent such witness from being examined, either as to circumstances that happened *before* the marriage, or even as to the very *fact* of the *marriage* itself. Thus, if a man be prosecuted for bigamy, his first wife cannot be called to prove her marriage with the defendant.¹ The rule also applies to all cases in which the interests of a married person, who is a defendant in a criminal proceeding, are involved, and therefore a wife cannot be witness for a *co-defendant*, as her testimony might tend, at least indirectly, to her husband's acquittal.² Thus, where the wife of

¹ Grigg's case, T. Ray. 1; 1 Hale, 693; 1 Russ. C. & M. 218.

² R. v. Thompson and others, 41 L. J., M. C. 112; 1 Law Rep., C. C. 377; 12 Cox, 202, S. C.

one prisoner was called to prove an alibi in favour of another jointly indicted with her husband for burglary, her testimony was rejected on the ground, that, by shaking the evidence of a witness for the prosecution who had identified both prisoners, it would materially weaken the case against the husband.¹

§ 1364. Moreover, as the courts recognise no distinction between § 1229 admitting the evidence of married persons for or against each other,² a husband has been deemed an inadmissible witness in support of a prosecution, which charged his wife and several other persons with conspiring to procure his marriage without the consent of his parents;³ and where four men were indicted for sheep-stealing, Mr. Baron Bolland rejected the testimony of the wife of one of them, who was called to prove facts against the other prisoners.⁴

§ 1365. But though the rule of exclusion is thus stringent § 1230 where a married person is criminally accused in conjunction with others, it is clear that where a married defendant has pleaded guilty,⁵ or is entirely removed from the record, whether by a verdict pronounced in his favour, or by a previous conviction, or by the jury not being charged with his interest at the time of the trial, his wife may testify either for or against any other persons who may be parties to the record;⁶ and the mere hope that, by giving evidence against a prisoner, a wife may procure the pardon of her husband who has been previously convicted of another crime, will by no means affect her competency, though it may, and indeed must, shake her credit.⁷ It seems scarcely necessary to add, that the wife of a prosecutor in a criminal proceeding would not be

¹ *R. v. Smith*, 1 Moo. C. C. 289. See, also, *R. v. Hood*, id. 281; *R. v. Frederick*, 2 Str. 1095; *R. v. Glassie*, 7 Cox, 1.

² *R. v. Perry*, per Gibbs, C. J., cited and approved of by Abbott, C. J., in *R. v. Serjeant*, Ry. & M. 354.

³ *R. v. Serjeant*, Ry. & M. 352.

⁴ *R. v. Webb*, 2 Russ. C. & M. 982. See 1 Hale, 301.

⁵ *R. v. Thompson & Simpson*, 3 Fost. & Fin. 824, per Keating, J.

⁶ *Hawkesworth v. Showler*, 12 M. & W. 49, 50, per Alderson, B.; *R. v. Williams*, 8 C. & P. 284, per id., who stated that, in Thurtell's case, Mrs. Probert was examined as the principal witness against Thurtell, after her husband was acquitted.

⁷ *R. v. Rudd*, 1 Lea. 127.

excluded by this rule from giving evidence either for the Crown or for the defendant.¹

§ 1366.² This rule of exclusion is extended only to *lawful* § 1231 marriages, or at least to such as are innocent in the eye of the law. Thus, upon a trial for bigamy, the first marriage being proved and not controverted, the woman, with whom the second marriage was had, is a competent witness either for or against the prisoner; for the second marriage is void.³ But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted.⁴ Whether a man can call as a witness a woman with whom he has long cohabited, whom he has constantly *represented to be his wife*, and by whom he has had children, has been declared to be at least doubtful.⁵ Lord Kenyon rejected such a witness, when offered by the prisoner in a capital case tried before him at Chester;⁶ but in that case the criminal had, *throughout the trial*, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned; and in the subsequent case of *Batthews v. Galindo*,⁷ where Lord Kenyon's ruling was discussed, Park and Burroughs, Js., declared that his lordship's decision was founded on this admission, and the whole court determined that a kept mistress was a competent witness for her protector, though she passed by his name and appeared to the world as his wife. So, where the parties had lived together as a man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held

¹ See *R. v. Houlton*, Jebb, C. C. 24.

² Gr. Ev. § 339, in part.

³ B. N. P. 287; *R. v. Serjeant, Ry. & M.* 354, per Abbott, C. J.

⁴ Grigg's case, T. Ray. 1. But it seems, that the wife, though inadmissible as a witness, may be *produced* in court for the purpose of being *identified*, although the proof thus mentioned may affix a criminal charge upon the husband; as, for example, to show that she was the person to whom he was first married; or, who passed a note; which he is charged with having stolen. *Alison*, Pract. of Cr. L. 463.

⁵ *Campbell v. Twemlow*, 1 Price, 88, 89, per Thompson, C. B.

⁶ Anon., cited by Richards, B., in 1 Price, 83.

⁷ 4 Bing. 610, 612, 613; 3 C. & P. 238, and 1 M. & P. 565, S. C.

to be a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation.¹ It seems, also, from this last case, and from several others,² that a supposed husband or wife may be examined on the *voire dire* facts showing the invalidity of the marriage; and it is apprehended that no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony.³

§ 1367.⁴ Whether the rule may be relaxed so as to admit the wife to testify for or against the husband, where the parties *consent* to such a course, is a question on which the authorities are not agreed.⁵ Lord Hardwicke was of opinion that she was not admissible to give evidence against her husband even with his consent;⁶ and this opinion has been followed in America,⁷ apparently upon the ground, that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, but that the public have also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. Still, Lord Chief Justice Best stated on one occasion,⁸ that he would receive the evidence of the wife if her husband con-

¹ *Wells v. Fletcher*, 5 C. & P. 12. per Patteson, J.; S. C. nom. *Wells v. Fisher*, 1 M. & Rob. 99, and n.

² *R. v. Peat*, 2 Lew. C. C. 288; *R. v. Wakefield*, id. 279; 1 Russ. C. & M. 218, n. *t*.

³ *R. v. Bramley*, 6 T. R. 330; *R. v. Bathwick*, 2 B. & Ad. 646, where Ld. Tenterden observed, that, "it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called."

⁴ Gr. Ev. § 340, in great part.

⁵ Under § 1710, cl. 1, of the New York Civ. Code," "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined, as to any communication made by one to the other during the marriage. But this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding, for a crime committed by one against the other."

⁶ *Barker v. Dixie*, Cas. temp. Hardw. 264.

⁷ *Randall's case*, 5 City Hall Rec. 141, 153, 154; *Colbern's case*, 1 Wheel. C. C. 479.

⁸ *Pedley v. Wellesley*, 3 C. & P. 558.

sented; apparently regarding the interest of the husband as the sole ground of her exclusion, since he cited a case where Sir James Mansfield¹ had once permitted a plaintiff to be examined with his own consent. This question was afterwards again mooted in the Court of Exchequer, in a case in which the defendant had called his wife as a witness, but the judge at Nisi Prius had rejected her testimony on objection taken.² The plaintiff had afterwards offered to waive the objection, but the judge had refused to receive the waiver. Under these circumstances the learned Barons,—without deciding the question whether the witness could be thus examined by consent,—were contented to hold that it was at least discretionary with the judge, whether he would allow the objection to be withdrawn, and he having refused to do so, they declined to interfere.³

§ 1368.⁴ Although, in the instances before mentioned, the husband and wife are inadmissible as witnesses for or against each other, in all other cases they may be called, notwithstanding the evidence of the one may *tend* to subject the other to a *criminal charge*.⁵ Thus, in a question respecting a female pauper's settlement, where a man testified that he was married to the pauper, another woman was admitted to prove her own previous marriage with the same man; for although, if the testimony of both witnesses was true, the husband was chargeable with the crime of bigamy, neither the evidence nor the record in that case would be receivable against him upon such a charge, the point at issue being *res inter alios acta*, and neither the husband nor the wife having any interest in the decision.⁶ So, in an action by the indorsee

¹ In the report, the decision is said to have been one of Ld. Mansfield's, but this is probably a mistake, as the case referred to would seem to be that of *Norden v. Williamson*, 1 Taunt. 377.

² This was before the passing of the Act 16 & 17 V., c. 83. See ante, § 1352.

³ *Barbat v. Allen*, 7 Ex. R. 609.

⁴ Gr. Ev, § 342, in part.

⁵ See *R. v. Halliday*, 20 L. J., M. C. 148; 8 Cox, 298; Bell, C. C. 257, S. C.

⁶ *R. v. Bathwick*, 2 B. & Ad. 639, 647; *R. v. All Saints, Worcester*, 6 M. & Sel. 194. These cases overrule *R. v. Cliviger*, 2 T. R. 263, where it was broadly held, that a wife was in every case incompetent to give evidence, *tending* to criminate her husband.

against the acceptor of a bill of exchange, the wife of the drawer would probably be permitted to prove that her husband had forged the bill;¹ though,—subsequently to the decision of *R. v. Bathwick*,—two learned judges are reported to have held, that, on an indictment for theft, a woman could not be called on the part of the Crown, to prove that her husband, who had absconded, was present when the property was taken, and that she saw him deliver it to the prisoner.²

§ 1369. But although, in these cases, the wife will be *permitted* § 1234 to testify against her husband, it by no means follows that she can be *compelled* to do so; and the better opinion is that she may throw herself upon the protection of the court, and decline to answer any question, which would tend to expose her husband to a criminal charge.³

§ 1370. In all actions, suits, and other proceedings between § 1235 third parties, husbands and wives will be permitted to *contradict*, and even to *discredit*, each other as freely as if the marriage was void.⁴ If this were not the law, great injustice might be done; since the competency of the witness would then depend upon the marshalling of the evidence, and the testimony of a husband might be rendered inadmissible for the defendant, from the accidental circumstances of his wife having been previously called on the part of the plaintiff, though had the defendant been entitled to begin, the husband would have been examined, and the wife rejected. In Ireland, all the judges have held, that the evidence of a wife could not be rejected on the ground that she was brought to contradict

¹ *Henman v. Dickinson*, 5 Bing. 183; 2 M. & P. 982, S. C. In this case the point was not expressly decided.

² *R. v. Gleed*, 2 Russ. C. & M. 983, per Taunton & Littledale, Js. Sed qu.

³ *R. v. All Saints, Worcester*, 6 M. & Sel. 200, per Bayley, J.; *Cartwright v. Green*, 8 Ves. 405; post, § 1453.

⁴ *Stapleton v. Crofts*, 18 Q. B. 368, per Ld. Campbell; 373, per Erle J.; 2 B. & Ad. 646, per Ld. Tenterden; 6 M. & Sel. 198, per Ld. Ellenborough; *Annesley v. Ld. Anglesea*, 17 How. St. Tr. 1276.

the testimony of her husband, even where he was the prosecutor of an indictment.¹

§ 1371.² On the rule which precludes husbands and wives from giving testimony for or against each other in criminal proceedings, a necessary exception has been engrafted *at common law*, when a personal injury has been committed by the one against the other. Were it not for this exception, the wife would be exposed without remedy to brutal treatment.³ If, therefore, a man be indicted for the forcible abduction of a woman with intent to marry her,⁴ she is clearly a competent witness against him, if the force were continuing against her till the marriage. Of this last fact also she is a competent witness; and the better opinion seems to be, that she is still competent, notwithstanding her subsequent assent to the marriage, and her voluntary cohabitation; for, otherwise, the offender would take advantage of his own wrong.⁵ So, on an indictment for the *fraudulent* abduction of an heiress, the lady has been admitted as a witness for the prosecution.⁶ So, a wife may testify against her husband on an indictment for assisting at a rape committed on her person;⁷ or, for an assault and battery upon her;⁸ or, for maliciously shooting,⁹ or attempting to poison,¹⁰ her; or, it seems, for any other offence against her liberty or person.¹¹ She may also exhibit articles of the peace against him, in which case her affidavit will not be allowed to be controlled and overthrown by his own.¹²

¹ *R. v. Houlton*, Jebb, C. C. 24.

² Gr. Ev. § 343, in part.

³ See *Bentley v. Cooke*, 3 Doug. 424.

⁴ Under 24 & 25 V., c. 100, § 54.

⁵ *R. v. Wakefield*, trial published by Murray; 2 Lew. C. C. 279, S. C.; 1 East, P. C. 454; *Brown's case*, 1 Ventr. 243; 1 Russ. C. & M. 709; 2 id. 984; *Perry's case*, cited in *R. v. Serjeant*, Ry. & M. 352; 1 Hawk. c. 41, § 13, 1 Bl. Com. 443; *M'Nally*, Ev. 179, 180; 3 Chit. Cr. L. 817, n. *y*.

⁶ *R. v. Yore*, 1 Jebb & Sy. 563. This case was decided on the Irish Act, now repealed, of 10 G. 4, c. 34, § 23. The law is re-enacted in 24 & 25 V., c. 100, § 53.

⁷ *Ld. Audley's case*, 3 How. St. Tr. 402, 413, Hutt, 115, 116; B. N. P. 287; *R. v. Jellyman*, 8 C. & P. 604.

⁸ B. N. P. 287; *R. v. Azire*, 1 Str. 633; *Soule's case*, 5 Greenl. 407.

⁹ *R. v. Whitehouse*, cited 2 Russ. C. & M. 984.

¹⁰ *R. v. Jagger*, cited 2 Russ. C. & M. 984.

¹¹ Per *Hullock*, B., in *R. v. Wakefield*, trial published by Murray, 257.

¹² *R. v. Doherty*, 13 East, 171; *Ld. Vane's case*, id. n. *a*; 2 Str. 1202; (4035)

Indeed, Mr. East considers it to be settled, that "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other."¹ But though competent as a witness, it is not indispensable that such party should be called;² and Mr. Justice Holroyd seems to have thought, that the husband or wife could only be admitted to prove facts, which could not be proved by any other witness.³ Still, it may fairly be questioned whether this be not restricting the rule within too narrow bounds. For many years doubts were entertained whether a wife was, or was not, an admissible witness against her husband, in cases where he was proceeded against, under the Vagrant Act,⁴ as a rogue and vagabond for *deserting* her, and for causing her to become chargeable to the parish.⁵ These doubts have now been resolved in the negative.⁶

§ 1371A. It must here be noted that the exception illustrated in the last section, has, with injudicious strictness, been confined to mere *personal* injuries; and consequently, a husband has not been permitted to give evidence against his wife or her paramour, where the two offenders were indicted conjointly for stealing his property at the time of their elopement.⁷ However, this unsatisfactory state of the law has now, by the joint operation of two statutes,⁸ been remedied, and in any criminal proceeding, whether brought by a wife against her husband "for the protection and security of her own separate property," or brought by a husband against his wife with respect to his property, the spouses respectively "shall be

R. v. Ld. Ferrers, 1 Burr. 635. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation; Lady Lawley's case, B. N. P. 287; or, on a habeas corpus sued out by him, for the same object, R. v. Mead, 1 Burr. 542.

¹ 1 East, P. C. 455; The People, ex. rel. Ordranax v. Chegaray, 18 Wend. 642.

² R. v. Pearce, 9 C. & P. 668.

³ In R. v. Whitehouse, cited 2 Russ. C. & M. 984.

⁴ 5 G. 4, c. 83, § 4; amended by 34 & 35 V., c. 112, § 15.

⁵ Sweeney v. Spooner, 32 L. J. M. C. 82; 3 B. & S. 329, S. C.

⁶ Reeve v. Wood, 34 L. J., M. C. 15; 10 Cox, 58; 5 B. & S. 364, S. C.

⁷ R. v. Brittleton & Bates, L. R., 12 Q. B. D. 266; 53 L. J., M. C. 83, S. C.

⁸ 45 & 46 V., c. 75, §§ 12, 16; amended by 47 & 48 V., c. 14, § 1.

competent and admissible witnesses, and, except when defendant, compellable to give evidence.”¹

§ 1372.² In cases of *high treason*, the question, whether the wife is admissible as a witness against her husband, has been much discussed, and opinions of great weight have been given on both sides. The affirmative of the question is maintained,³ on the ground of the extreme necessity of the case, and the nature of the offence, tending, as it does, to the destruction of many lives, the subversion of government, and the sacrifice of social happiness. But, on the other hand, it is argued, that these political reasons are not sufficient to support an exception to a rule of general utility, and that, as the wife is not bound to discover her husband's treason,⁴ by parity of reason, she is not compellable to testify against him.⁵ The latter is perhaps the better opinion. § 1237

§ 1373. The *third class* of persons incompetent to testify includes witnesses, who, being called for the Crown in cases of *high treason* or misprision of treason, have not been included or properly described in a *list* duly delivered to the defendant. This head of incompetency rests on an Act passed in the seventh year of Queen Anne, which enacts,⁶ that, “when any person is indicted for high treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted, ten days before the § 1238

¹ 47 & 48 V., c. 14, § 1.

² Gr. Ev. § 345, in great part.

³ B. N. P. 286; 1 Gilb. Ev. 252; Grigg's case, T. Ray. 1.

⁴ 1 Brownl. 47.

⁵ 1 Hale, 301; 2 Hawk. c. 46, § 82; Bac. Abr., tit. Ev. A. 1; 1 Chit. Cr. L. 595; M'Nally, Ev. 181.

⁶ 7 A., c. 21, § 11; extended to Ireland by 17 & 18 V., c. 26. This last Act was passed in consequence of the decision of the House of Lords in *O'Brien v. R.*, 2 H. of L. Cas. 465.

trial, and in presence of two or more credible witnesses." It must be noted, that these words do not extend to treasons which consist in compassing the assassination, wounding, or injuring the person of the Sovereign, or to the misprisions of such treasons; because parties accused of such grievous offences are, by statute, rendered liable to be dealt with as if they stood charged with murder.¹ Moreover, though, in strict law, the list of witnesses should be delivered *simultaneously* with the jury list and the copy of the indictment, and that, too, ten days at least before the arraignment (for the word "trial" must, since the Jury Act, bear this interpretation²) and in the presence of two or more credible witnesses;—yet any objection founded on the non-compliance with these regulations must be taken before the jury are sworn, and can only have the effect of postponing the trial.³ If, however, instead of raising any objection which goes to the array of witnesses, the defendant simply objects that some particular witness is incompetent, as not being included in the list, or as being misdescribed therein, this point, like any other question of competency, may be taken upon the *voire dire* when the witness is called, and if it prevails, he cannot be examined.⁴

§ 1374. The Act, as we have seen, requires that the name, place of abode, and profession, of each witness should be stated in the list, the object of this regulation being, that the defendant should be enabled before the trial to make all due inquiry respecting the characters or the persons who are about to testify against him. It is not, however, necessary that the list should specify the particular house or street where the witness resides, but it will suffice if it describes him as living in a certain town or parish.⁵ So, if the witness has two or more residences, the list need only specify one; but if it aim at further particularity, and any one of the places of abode be misdescribed, this inaccuracy will vitiate the whole descrip-

¹ 39 & 40 G. 3, c. 93; 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V., c. 51, § 1; ante, § 958.

² 6 G. 4, c. 50, § 21; R. v. Ld. Geo. Gordon, 21 How. St. Tr. 648.

³ R. v. Frost, 9 C. & P. 162—187; 2 Moo. C. C. 140, S. C.; O'Brien v. R., 2 H. of L. Cas. 465.

⁴ R. v. Frost, 9 C. & P. 183.

⁵ Id. 147, 148.

tion.¹ If the witness has recently changed his place of abode, the prisoner must be furnished with a description of his last residence, and it will not be sufficient to describe him as *lately* abiding at the former place.²

§ 1375. The *last class* of persons rejected by the law as witnesses, includes all those who are incapable of comprehending the nature of an oath or affirmation, or of giving a moderately rational answer to a sensible question. It makes no difference from what cause this incapacity may arise; for whether it be occasioned by a congenital want of intellect, or by some temporary obscuration of the reasoning faculties, or by mere unripeness of understanding,—whether the person be an idiot, a lunatic, a drunkard, or a child,—he cannot, so long as the defect exists, be examined as a witness.³ The incapacity, however, is only co-extensive with the defect. Thus a monomaniac, or a person who is afflicted with partial insanity, will be an admissible witness, if the judge finds upon investigation that he is aware of the nature of an oath or declaration, and that he is capable of understanding the subject, with respect to which he is required to testify.⁴ So, in the case of total madness, the occurrence of a lucid interval,⁵—in the case of intoxication, the return of sobriety,⁶—will render the witness competent; and the judges will occasionally postpone trials of importance, if they have good cause to believe that the witness within a reasonable time will be able to testify, and if, without his testimony, the ends of justice will probably be defeated.⁷ In all such cases, however, the applica-

¹ 9 C. & P. 151—153.

² *R. v. Watson*, 2 Stark. R. 116, 128; 32 How. St. Tr. 69—73, S. C.

³ In India, the rule on this subject is as follows:—"All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. Explanation—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them." § 118 of Ind. Ev. Act, 1872.

⁴ *R. v. Hill*, 2 Den. 254. See *Spittle v. Walton*, 11 Law Rep., Eq. 420; 40 L. J., Ch. 368, S. C.

⁵ Com. Dig. Testmoigne, A. 1.

⁶ *Hartford v. Palmer*, 16 Johns. 153; Hein. ad Pand., Pars 3, § 14.

⁷ *R. v. White*, 1 Lea. 430, n. a; 3 Bac. Ab. 202, n.

tion for postponement must be made before the jury is sworn, as the court cannot on this ground discharge the jury after the commencement of the trial.¹

§ 1376.² The judges formerly held that persons *deaf and dumb* § 1241 from their birth, were in contemplation of law idiots;³ but this presumption is certainly no longer recognised,⁴ as persons afflicted with these calamities have been found, by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed.⁵ Still, when a deaf mute is adduced as a witness, the court, in the exercise of due caution, will take care to ascertain before he is examined, that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. When the judge is satisfied on these heads, the witness may be sworn and give evidence by means of an interpreter. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory method;⁶ but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs.⁷

§ 1377. With respect to *children*, no *precise age* is fixed by law, § 1242 within which they are absolutely excluded from giving evidence, on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of *intelligence* and *knowledge*, which will render a child a competent witness. In all questions of this kind much must ever depend

¹ R. v. Wade, 1 Moo. C. C. 86; R. v. Kinloch, 18 How. St. Tr. 402, 408.

² Gr. Ev. § 366, in some part.

³ R. v. Steel, 1 Lea. 452.

⁴ Harrod v. Harrod, 1 Kay & L. 9, per Wood, V.-C. If a deaf mute be put on his trial for felony, and the jury find that he cannot understand the proceedings, he will be detained as a non-sane person during the Queen's pleasure, R. v. Berry, L. R., 1 Q. B. D. 447; 45 L. J., M. C. 123, S. C.

⁵ On one occasion the author had to decide a cause at the Lambeth County Court on the sole testimony of three deaf and dumb witnesses, viz., the plaintiff and his wife on the one side, and the defendant on the other.

⁶ Morrison v. Lennard, 3 C. & P. 127, per Best, C. J.

⁷ Id.; R. v. Ruston; 1 Lea. 408; R. v. Steel, id. 452; The State v. De Wolf, 8 Conn. 93; Com. v. Hill, 14 Mass. 207.

upon the good sense and discretion of the judge; ¹ who will do well in remembering the wise rule promulgated by the Indian Evidence Act of 1855, that "children under seven years of age, who appear incapable of receiving just impressions of the facts" to be deposed to, "or of relating them truly," ² ought not to be examined. In practice, it is not unusual to receive testimony of children of *eight or nine years of age* when they appear to possess sufficient understanding; and in Braiser's case, ³ which was an indictment for assaulting with intent to rape an infant, who was certainly under seven years of age, ⁴ and perhaps only five, ⁵ all the judges held that she might have been examined upon oath, if, on strict examination by the court, she had been found to comprehend the danger and impiety of falsehood. But, in Pike's case, ⁶ Mr. Justice Park, with the concurrence of Mr. Justice James Parke, promptly rejected the dying declarations of a child of four years of age, observing that, however precocious her mind might have been, it was quite impos-

¹ The utter want of discretion in dealing with this subject, which has sometimes been evinced by the inferior functionaries of the law, is admirably ridiculed by Mr. Dickens in his "Bleak House." A little crossing-sweeper being brought up before a coroner, to give evidence on an inquest, the narrative thus proceeds:—"Name Jo. Nothing else that he knows on. * * * Knows a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him arter he's dead, if he tells a lie to the gentleman, but believes it'll be something wery bad to punish him, and sarve him right—and so he'll tell the truth.' 'This won't do, gentlemen,' says the coroner, with a melancholy shake of the head. 'Don't you think you can receive his evidence, sir?' asks an attentive jurymen. 'Out of the question,' says the coroner; 'you have heard the boy; *can't exactly say* won't do, you know. We can't take *that* in a court of justice, gentlemen. It's *terrible depravity*. Put the boy aside.' Boy put aside; to the great edification of the audience; especially of little Swills, the comic vocalist." P. 104.

² Act ii. of 1855, § 14. Now repealed by the Indian Evid. Act, 1872.

³ R. v. Brasier, 1 Lea. 199; 1 East, P. C. 443; B. N. P. 293, S. G.; Jackson v. Gridley, 18 Johns. 98.

⁴ 1 Lea. 199. See R. v. Perkin, 2 Moo. C. C. 139, where Alderson, B., observed—"It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge will allow him to be sworn." See, also, R. v. Holmes, 2 Fost. & Fin. 788, where a child six years old was allowed to testify as to a rape having been committed on her, she having stated to the judge, Wightman, J., that she said her prayers, and thought it was wrong to tell lies.

⁵ 1 East, P. C. 443.

⁶ 3 C. & P. 598.

sible that she could have had sufficient understanding to render her declarations admissible.

§ 1878. It is here proper to observe that the law, in its wisdom, § 1243 places no reliance on unsworn testimony. Many witnesses would, doubtless, feel bound to speak the truth in courts of justice, as elsewhere, from a simple regard to their own characters, or to the common interests of society, or from a sense of moral rectitude, quite irrespective of any religious belief, or of any fear of punishment. But such upright motives would, as surely, be often disregarded by unscrupulous persons; and common prudence, therefore suggest the propriety of having recourse to such additional safeguards against deception as may be readily available. Now, two of the main securities which the law provides for the truth of testimony in judicial proceedings are, that it be delivered, first, under the religious or moral sanction of an oath, affirmation, or declaration; and next, at the risk of a prosecution for perjury. Indeed, no person, whatever functions he may have to discharge in relation to the cause in question, or whatever be his rank, age,¹ country,² or belief, can give testimony upon any trial, civil or criminal,³ until he have, in one form or other, either given an outward pledge that he considers himself responsible to God for the truth of what he is about to narrate, or, at least, rendered himself liable to the temporal penalties of perjury, in the event of his wilfully and corruptly giving false testimony.⁴

§ 1379. Thus, although each jurymen may apply to the subject § 1244 before him that general knowledge which any man may be supposed

¹ *R. v. Brasier*, 1 Lea. 199, overruling the opinion of *Ld. Hale*. See 1 *Hale*, 634.

² In some few of the British colonies, where the aborigines are "destitute of the knowledge of God and of any religious belief," ordinances have been made for the admission of the testimony of such persons without the previous sanction of an oath, and the legality of such ordinances has been recognised and established by the Legislature. See 6 & 7 V., c. 22.

³ This law applies to courts-martial, see 44 & 45 V., c. 58, § 52, subs. 3. A witness who commits perjury before a court-martial may, if subject, to military law, be punished by court-martial, § 29; but if not so subject, he must be prosecuted before a civil court, § 126, subs. 2.

⁴ See 32 & 33 V., c. 68, § 4, cited post, § 1382.

to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there be no necessity for his leaving the box, or declining to interfere in the verdict.¹ So a judge, before whom the cause is tried, must conceal any fact within his own knowledge, unless he be first sworn;² and consequently, if he be the sole judge, it seems that he cannot depose as a witness,³ though if he be sitting with others, he may then be sworn and give evidence.⁴ In this last case, the proper course appears to be that the judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial,⁵ because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another.⁶ It must, however, be noticed, that on several occasions, when trials have been instituted before the High Court of Parliament, peers, who have been examined as witnesses, have, nevertheless, taken part in the verdict subsequently pronounced.⁷ But, perhaps, these cases are not inconsistent with the law as above stated, since in trials before the House of Lords, the peers must be regarded at least as much in the light of jurors as of judges; and it has been shown that a juryman is not disqualified from acting, simply by being called as a witness.

§ 1380. Again, though a Peer is privileged, while sitting in judgment, to give his verdict upon his honour,⁸ and was also per-

¹ *R. v. Rosser*, 7 C. & P. 648, per Parke, B.; *Manley v. Shaw*, C. & Marsh. 361, per Tindal, C. J.; *Bennet v. Hartford*, Sty. 233; *Fitz-James v. Moys*, 1 Sid. 133; *Andr.* 321, arg.; *R. v. Heath*, 18 How. St. Tr. 123; *R. v. Sutton*, 4 M. & Sel. 532, 541, 542; 6 How. St. Tr. 1012, n.

² *R. v. Anderson*, 7 How. St. Tr. 874; *Hurpurshad v. Sheo Dyal*, L. R. 3 Ind. App. 259, 286.

³ *Ross v. Buhler*, 2 Mart., N. S. 312. But see 11 How. St. Tr. 459.

⁴ *Trial of the Regicides*, Kel. 12; 5 How. St. Tr. 1181, n. S. C.

⁵ *Id.* As to when judges are not compellable to testify, see ante, § 938.

⁶ *Ross v. Buhler*, 2 Mart., N. S. 312. So is the law of Spain; *Partid.* 3, tit. 16, l. 19; 1 Moreau and Carleton's Tr. p. 200;—and of Scotland, *Glasst. Ev.* 602; *Tait. Ev.* 432; *Stair, Inst. lib.* 4 tit. 45, 4; *Ersk., Inst. lib.* 4, tit. 2, 33.

⁷ 7 How. St. Tr. 1384, 1458, 1552; 16 How. St. Tr. 1252, 1391.

⁸ 2 Inst. 49.

mitted, under the old law, to answer a bill in Chancery upon his protestation of honour, and not upon his oath,¹ he cannot be examined as a witness in any cause, whether civil or criminal, or in any court of justice, whether it be an inferior court or the House of Lords, or in any manner, whether *vivâ voce*, or by interrogatories, or by affidavit, unless he be first sworn;² for the respect which the law shows to the honour of a Peer, does not extend so far as to overturn the settled maxim, that in *judicio non creditur nisi juratis*.³ If, therefore, he refuses to take the necessary oath or affirmation, he will, notwithstanding the privileges of peerage or of Parliament, be guilty of a contempt for which he may be committed and fined.⁴ On a trial in Ireland, where the Lord Lieutenant was called as a witness, an attestation on honour, instead of an oath, was by mistake administered to him, and he was then examined and cross-examined, without any objection being taken to the reception of his evidence. Subsequently, a motion for a new trial was made, on the ground that the testimony of an unsworn witness had been received; but the court, having ascertained that the losing party had from the first been aware of the irregularity, very properly held that his objection came too late,⁵ and the rule was consequently discharged.⁶

§ 1381. It seems that even the Sovereign could not now claim any exemption from the rule requiring oral testimony to be given upon oath,⁷ though, on one occasion, the simple certificate of King James I., as to what had passed in his hearing, was received as evidence in the Court of Chancery.⁸ The question whether the Sovereign could be examined as a witness at all, seeing that the evidence would be without temporal sanction, may admit of some doubt. The point arose in the reign of Charles I., when the Earl

¹ *Mears v. Ld. Stourton*, 1 P. Wms. 146; 2 Salk. 512, S. C.; Cons. Ord. Ch. 1860, Ord. XV., r. 6, now annulled by Rules of Sup. Ct. 1883, App. O.

² 2 How. St. Tr. 772, n.; 7 How. St. Tr. 1458; 16 How. St. Tr. 1252; *R. v. Preston*, 1 Salk. 278; *Ld. Shaftesbury v. Ld. Digby*, 3 Keb. 631.

³ 2 Salk. 512; Cro. Car. 64; 1 Bl. Com. 402; 3 Bac. Abr. 202.

⁴ 3 Salk. 278; 4 Ld. Brougham's Speech, 368.

⁵ See *Richards v. Hough*, 51 L. J., Q. B. 361.

⁶ *Birch v. Somerville*, 2 Ir. Law R., N. S. 243.

⁷ 2 Roll. Abr. 686; *Omichund v. Barker*, Willes, 550.

⁸ *Abignye v. Clifton*, Hob. 213.

of Bristol, who was impeached for high treason, proposed to call the King, for the purpose of proving certain conversations which he had held with him while Prince. The subject was referred to the judges; but they, acting under the direction of his Majesty, forbore from giving any opinion, and the question remains to this day undetermined.¹ In the Berkeley Peerage case, counsel entertained some idea of calling the Prince Regent as a witness; but it ultimately became unnecessary to do so. On the whole, the better opinion seems to be, that the Sovereign, if so pleased, may be examined as a witness in any case, civil or criminal, but not without being sworn.²

§ 1382.³ The wisdom of requiring witnesses to be sworn, except- § 1247
ing under very special circumstances, cannot well be disputed; for, although the ordinary definition of an oath,—viz., “a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth,”⁴—may be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God;—not to call upon Him to punish the wrong-doer, but on the witness to remember that he will assuredly do so;—still, it must be admitted, that by thus laying hold of the conscience of the witness, the law best insures the utterance of truth.⁵ But as the administration of an oath supposes that the witness feels a moral and religious accountability to a Supreme Being, who will justly punish perjury, and from whom no secrets are hid, persons, insensible to the obligations of an oath, ought not to be sworn. The repetition of the words of an oath would, in their case, be an unmeaning formality. The question, however, still remains:—should such persons be allowed to give testimony in courts of justice? and to this question, while the common law pronounces a negative,⁶ the Legislature of

¹ 2 Ld. Campbell's Lives of the Chanc., 510, 511.

² Id. in n.

³ Gr. Ev. § 328, in some part.

⁴ R. v. White, 1 Lea. 430; The Queen's case, 2 B. & B. 285.

⁵ Tyler on Oaths, 12, 15. See, also, Omichund v. Barker, 1 Atk. 21; Willes, 538, S. C.

⁶ B. N. P. 292; 1 Atk. 40, 45; Maden v. Catanach, 7 H. & N. 360; 31 L. J., Ex. 118, S. C.

1869 has given an affirmative, answer. "If any person," says the Evidence Amendment Act of that year,¹ "called to give evidence in any court of justice,² whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge³ is satisfied that the taking of an oath would have no binding effect on his conscience, make" a solemn promise and declaration;³ and then, if false evidence be wilfully and corruptly given by him, he shall be liable to indictment for perjury.⁴

§ 1383. The policy of thus relaxing in favour of Atheists one of § 1248 the fundamental safeguards of truth, and of encouraging the public avowal, if not the collusive assumption, of infidelity and irreligion, may admit of a serious doubt; and the more so, as the cases, in which any inconvenience could arise from the old law, are unquestionably of very rare occurrence.⁵ Waiving, however, all discussion on this subject, it may here suffice to point out that, to give vitality to the enactment in question, two events must concur:—first, the person called as a witness must either object to take an oath, or be

¹ 32 & 33 V., c. 66, § 4.

² These words, "Court of Justice" and "presiding judge," include any person or persons having, by law, authority to administer an oath for the taking of evidence," 33 & 34 V., c. 49, § 1. But the Act does not apply to members of Parliament, who are required to take an oath before voting. *Clarke v. Bradlaugh*, 50 L. J., Q. B. 342, per Ct. of App.; L. R., 7 Q. B. D. 38, S. C.

³ This is the Form:—"I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth."

⁴ The Army Act, 1881, contains a similar enactment with respect to witnesses summoned to give evidence before courts-martial, 44 & 45 V., c. 58, § 52, subs. 4. In India every person who may by law be sworn, or called upon to make a solemn affirmation, in any capacity whatever, may, if he objects to such oath or solemn affirmation, make in place thereof a simple affirmation, omitting the words 'So help me God,' 'In the presence of Almighty God,' or other expressions of the same nature. Ind. Oaths Act, No. 6 of 1872. This distinction between solemn and simple affirmation is sufficiently funny.

⁵ The author, during the thirty-two years he has been a Judge of County Courts, has heard the oath administered to at least 300,000 witnesses, yet he cannot recall to mind a single instance where any atheistical objection to being sworn has been raised before him.

objected to as incompetent to be sworn; and next, the judge is required to satisfy himself that the taking of an oath by such person would have no binding effect upon his conscience. An inquiry, therefore, must always be made into the religious opinions and moral sentiments of the witness, and it is as necessary now, as it was before the act was passed, to gauge his faith in a Deity, who is alike the rewarder of truth and the avenger of falsehood.

§ 1384. Now the *degree of religious faith*, which is presumed capable of binding the conscience of a witness to speak the truth, and which consequently will render him competent to take an oath, seems, as at present understood, to be a belief in the existence of God, and in the fact that Divine punishment will be the certain consequence of perjury. It matters not whether the witness believes that the punishment will be inflicted in this world, or in the next. It is enough if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath.¹ § 1249

§ 1385.² Defect of religious faith is *never presumed*. On the contrary, the law presumes that every man brought up in a Christian land believes in God and fears Him. The charity of its judgment is extended alike to all. The burthen is not on the party adducing the witness, to prove that he is a believer; but on the objecting party, to prove that he is not. Neither does the law presume that any man is a hypocrite, but it presumes that he is what he professes to be, whether atheist or believer; and whatever religious opinions he is proved to have once entertained, they are,—unless a long interval has elapsed,³—presumed to continue unchanged till the contrary is shown.⁴ One mode, and perhaps the § 1250

¹ In *Omichund v. Barker*, Willes, 532, 545; 1 Atk. 21; 1 Smith, L. C., 381, S. C., the proper test of the competency of a witness to be sworn was settled, upon great consideration, to be, the belief of a God, and that he will reward and punish us according to our deserts. This rule was recognised in *Butts v. Swartwood*, 2 Cowen, 431; *The People v. Matteson*, 2 Cowen, 433, 573, n.; and by Story, J., in *Wakefield v. Ross*, 5 Mason, 18; 9 Dane, Abr. 317, S. P. See, as to the Scottish Law, 2 Dickson, Ev. 849.

² Gr. Ev. § 370, in part.

³ In *Att.-Gen. v. Bradlaugh*, per Ld. Coleridge, commenting on the above passage, 30 June, 1884.

⁴ Ante, § 197; *The State v. Stinson*, 7 Law Reporter, 383.

least objectionable mode, of proving that a witness is incompetent to take an oath on the ground of want of religious belief, is by furnishing evidence of his atheistical declarations previously made to others;¹ but the witness may himself be interrogated upon the subject, either before he is sworn at all, or after he has been sworn upon the *voire dire*;² or, even, as it would seem, after having been sworn in the cause.³

§ 1386. Lord Brougham's Act of 1851 to amend the law of § 1251 Evidence contains an important clause with respect to the administration of oaths. The clause is as follows:—"Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."⁴ The Rules also of the Supreme Court, 1883, —with the view, it is presumed, of making assurance doubly sure, — have specially provided that "any officer of the court, or other person directed to take the examination of any witness or person;"⁵ "each chief clerk of the Chancery Division, for the purpose of any proceedings directed to be taken before him;"⁶ and "the taxing officers of the Supreme Court, or of any Division thereof, for the purpose of any proceeding before them;"⁷ may respectively administer oaths. Order LXI. further provides by R. 5, that, "every Master, and every first and second class clerk in the Filing and Record Department, shall, by virtue of his office, have authority to take oaths and affidavits in the Supreme Court." The Bankruptcy Act, 1883, also contains two sections on this

¹ See 1 Law Reporter, pp. 347, 348, as to the American law; and 2 Dickson, Ev. 849, 850, 907, as to the Scottish law.

² *R. v. White*, 1 Lea. 430; *Maden v. Catanach*, 31 L. J., Ex. 118; 7 H. & N. 360, S. C.

³ *R. v. Taylor*, Pea. R. 11, per Buller, J.; *The Queen's case*, 2 B. & B. 284.

⁴ 14 & 15 V., c. 99, § 16. See, also, 18 & 19 V., c. 42, cited post, §§ 1567, 1568, which empowers diplomatic and consular agents abroad to administer oaths and do notarial acts.

⁵ Ord. XXXVII., R. 19.

⁶ Ord. LV., R. 16. See also R. 17.

⁷ Ord. LXV., R. 27, subs. 25.

subject. The first provides, that Official Receivers "may, for the purpose of affidavits verifying proofs, petitions, or other proceedings under this Act, administer oaths;"¹ and the second enacts, that, "for the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits."²

§ 1387. The Consolidated General Orders of the Court of Chancery, which were promulgated in 1860, contained an express rule, that "oaths shall be administered in a reverent manner."³ This rule is now annulled,⁴ but allusion is here made to it, because it is feared that those who attend the sittings at Nisi Prius, or who watch the proceedings of our inferior courts of Justice, may sometimes be led to imagine that no such rule is recognised as part of the common law.

§ 1388.⁵ All witnesses ought to be sworn according to the peculiar ceremonies of their own religion, or in *such manner* as they deem binding on their consciences.⁶ This doctrine of the civil

¹ 46 & 47 V., c. 52, § 68, subs. 2.

² Id., Sch. II., r. 26.

³ Ord. XIX., R. 14.

⁴ Rules of Sup. Ct., 1883, App. O.

⁵ Gr. Ev. § 371, in part.

⁶ "Quumque sit adseveratio religiosa, satis patet, jusjurandum attemperandum esse cujusque religioni." Hein. ad Pand. p. 3, §§ 13, 15. "Quodcumque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione jurantis; et inutile esse, nisi quis credat Deum, quem testem advocat, perjuri sui idoneum esse vindicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex sua ipsius animi religione," &c. Bynk. Obs. Jur. Rom. lib. 6, c. 2. See, also, Puff. lib. 4, c. 2, § 4. The formula of taking an oath, which was anciently adopted by the Romans, was as follows:—The witness held a flint stone in his right hand, and dropped it as he uttered these words—*Si sciens fallo, tum me Diespiter, salvâ urbe arceque, bonis ejiciat, ut ego hunc lapidem.* Adam's Ant. 247. Cic. Fam. Ep. vii. 1, 12. Under the Christian emperors it was taken, invocato Dei Omnipotentis nomine, Cod. lib. 2, tit. 4, l. 41. *Sacro-sanctis evangelii tactis*, Cod. lib. 3, tit. 1, l. 14. And Constantine adds, in a rescript, *Jurisjurandi religione testes, priusquam perhibeant testimonium, jamdudum aretari præcipimus*, Cod. lib. 4, tit. 20, l. 9. In Morgan's case, 1 Lea. 54, a Mahomedan was sworn thus:—First, he placed his right hand flat upon the Koran, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head: he then looked for some time upon it, and, on being asked what the ceremony was to produce, he answered that he was bound by it to speak the truth. In Scotland, members

law,—which in the great case of *Omichund v. Barker*¹ was settled to be also a rule at common law,²—has received a legislative sanction by the Act of 1 & 2 V., c. 105; for that statute enacts, that all persons shall be bound by the oaths which are lawfully administered to them, provided they are administered in such form, and with such ceremonies, as the parties sworn declare to be binding on their consciences. In order to ascertain what form is so binding, the court should inquire of the witness himself; and the proper time for making this inquiry is before he is sworn. If, however, the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked, whether he thinks it binding on his conscience; but if he answers in the affirmative, he cannot then be further asked, if he considers any other form of oath more binding.³ Neither can a witness, who states that he is a Christian, be asked any further questions before he is sworn.⁴ If a witness, without objection, is sworn in the usual mode, but being of a different faith, the oath is not in a form affecting his conscience,—as if, being a Jew, he is sworn on the Gospels,—he is still punishable for perjury if he swears falsely, and the adverse party cannot for this cause have a new trial.⁵

of the Kirk are sworn by the form of holding up the right hand, without touching the book or kissing it. *Mildrone's case*, 1 Lea. 412; *Walker's case*, id. 498; *Mee v. Reid*, Pea. R. 23. It seems that in this case the form of words may either be, “I, A. B., swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give,” &c.; or, I swear according to the custom of my country and the religion I profess that the evidence,” &c. See 1 Lea. 412. A Jew is sworn on the Pentateuch with his head covered, *Willes*, 543; but if he professes Christianity, he may be sworn on the New Testament, though he has not formally renounced Judaism, *R. v. Gilham*, 1 Esp. 285. A Chinese is sworn by the ceremony of his breaking a saucer previously to the administration of the oath, *R. v. Entrehman*, C. & Marsh. 248. Roman Catholics in Ireland are sworn on a Testament, with a crucifix or cross upon it, *M’Nally*, Ev. 97.

¹ *Willes*, 538; 1 Atk. 21; 1 Smith, L. C. 381, S. C.

² Per *Alderson, B.*, in *Miller v. Salomons*, 7 Ex. R. 534, 535, and per *Pollock, C. B.*, id. 558.

³ *The Queen's Case*, 2 B. & B. 284.

⁴ *R. v. Serva*, 2 C. & Kir. 56, per *Platt, B.*

⁵ *Sells v. Hoare*, 3 B. & B. 232; 7 Moore, 36, S. C. *The State v. Whisenhurst*, 2 Hawks. 458. See *R. v. Wood, Jebb & B. vii*. Whether a party will be entitled to a new trial, if a witness on the other side has testified without having been sworn at all, is a question, the solution of which depends upon circumstances. If the omission of the oath was known at the time of the

§ 1389. Irrespective of the recent relaxation of the law, so far as it relates to Atheists,¹ the Legislature, out of tender regard for the conscientious scruples of certain religious sects,² and of other persons endowed with peculiar moral susceptibilities, has allowed them, in the place of taking an oath, to make a solemn affirmation;³ but such affirmation has the same effect as an oath, and persons who knowingly affirm what is false are equally guilty of perjury with those who falsely swear. Thus, the Act of 3 & 4 W. 4, c. 49, allows Quakers and Moravians to affirm in all cases where an oath is required;⁴ the Act of 3 & 4 W. 4, c. 82, contains a similar provision in favour of the sect of Separatists;⁵ and the Act of 1 & 2 V., c. 77,—which was passed in consequence of the decision pronounced by the judges in Doran's case,⁶—extends the privilege to all persons who have been Quakers or Moravians, but have ceased to belong to either of those sects.⁷ The Common original trial, he will not. *Birch v. Somerville*, 2 Ir. Law R., N. S. 243, cited ante, § 1380; *Lawrence v. Houghton*, 5 Johns. 129; *White v. Hawn*, id. 351. But it was not discovered till after the trial, he will; *Hawks v. Baker*, 6 Greenl. 72. See *Richards v. Hough*, 51 L. J., Q. B. 361.

¹ See ante, §§ 1382, 1383.

² Gentlemen of the Yea and Nay school, who love to interpret literally our Saviour's injunction, "Swear not at all," seem utterly to ignore the fact that Christ himself not only submitted to be sworn before the Sanhedrim, but actually refused to answer until he was put upon his oath by the high priest. See and compare 5th Ch. of St. Mat., vv. 34—37, and 26th Ch. of St. Matt., vv. 59—64.

³ Since the year 1835, declarations have, also, by virtue of the wise Act 5 & 6 W. 4, c. 62, been substituted on very many occasions for the oaths, whether official, or extra-judicial, or voluntary, which were formerly in use; and any person who wilfully and corruptly makes and subscribes any such declaration, knowing it to be untrue in any material particular, is guilty of a misdemeanor.

⁴ This is the Form:—"I, A. B., being one of the people called Quakers, [or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, as the case may be,] do solemnly, sincerely, and truly declare and affirm," &c.

⁵ This is the Form:—"I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare, that I am a member of that religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also, in the same solemn manner, declare and affirm," &c.

⁶ 2 Moo. C. C. 37.

⁷ This is the Form:—"I, A. B., having been one of the people called Quakers, [or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, as the case may be,] and entertaining conscientious

Law Procedure Act of 1854 proceeds a step further in advance, and enacts that, "if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration."¹ This enactment,—which in its original form was cautiously confined to courts of civil judicature in England and Ireland,²—has, by virtue of minute instalments of legal amendment, been extended to all courts of justice, whether civil or criminal, in England,³ Ireland,⁴ or Scotland;⁵ and so anxious have members of Parliament been to do ample justice to Ireland in this matter, that in affording to that country the advantage of the altered law, they have encored, as it were, the work of legislation, and have passed two independent statutes to carry out one and the same object.⁶

§ 1390. It may here be noticed, as the practice was formerly § 1254A different,⁷ that debtors and their wives, whether in England,⁸ or in Ireland,⁹ may now be examined upon oath by the Courts of Bankruptcy, concerning the debtor, his dealings, or property.

objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm," &c.

¹ 17 & 18 V., c. 125, § 20. This is the Form :—"I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c. This form must be complied with in the case of an affidavit, though the party making it be a foreigner domiciled abroad. In re Prince Henry, 49 L. J., Pr. & Mat. 67. § 21 enacts, that persons wilfully making false affirmations shall be subject to the same punishment as for perjury.

² 17 & 18 V., c. 125, § 103.

³ 24 & 25 V., c. 66, § 1.

⁴ 19 & 20 V., c. 102, §§ 23, 98, Ir.; 24 & 25 V., c. 66, § 1.

⁵ 28 & 29 V., c. 9, Sc.

⁶ 19 & 20 V., c. 102, §§ 23, 98, Ir.; 24 & 25 V., c. 66, § 1.

⁷ 24 & 25 V., c. 134, § 211.

⁸ 46 & 47 V., c. 52, § 27.

⁹ 20 & 21 V., c. 60, §§ 306, 307, Ir.

§ 1391. The judges at Nisi Prius were at one time inclined to regard as *incompetent to testify* all persons, whether *counsel, solicitors*, or *parties*, who, being engaged in a cause, had actually addressed the jury on behalf of that side on which they were afterwards called upon to give evidence.¹ Further investigation of the subject, however, has led to a judicial acknowledgment that no such rule of practice exists;² although the obvious inconvenience of permitting one and the same person, first, to state the case as an advocate, and next, to prove that statement as a witness, appears to furnish ample justification for its immediate adoption.³ With respect to private prosecutors, it may be observed, that as they have no right to address the jury,⁴ even though they waive their title to give evidence on oath, they will not be permitted under any circumstances to act in the two-fold capacity of advocates and witnesses.⁵ § 1255

§ 1392. In regard to the *proper time of taking the objection* to the competency of a witness, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the examination in chief. Indeed, it has been frequently said by judges, and sometimes so held, that a party who is aware of the existence of any disqualification, cannot lie by and allow the witness to be examined, and afterwards object to his competency, if he should dislike his testimony.⁶ However, this doctrine has § 1256

¹ *Stones v. Byron*, 4 Dowl. & L. 393, per Patteson, J.; *Deane v. Packwood*, id. 395, n. b, per Erle, J. See Best, Ev. 250—258.

² *Cobbett v. Hudson*, 22 L. J., Q. B. 11; 1 E. & B. 11, S. C.

³ Id.

⁴ *R. v. Gurney*, 11 Cox, 414.

⁵ *R. v. Brice*, 2 B. & A. 606; *R. v. Milne*, cited id. n. a; *Cobbett v. Hudson*, 22 L. J., Q. B. 13, per Ld. Campbell; 1 E. & B. 13, S. C.

⁶ *Dewdney v. Palmer*, 4 M. & W. 664; 7 Dowl. 177., S. C.; *R. v. Watson*, 2 Stark. R. 158; 32 How. St. Tr. 496, 497, S. C.; *R. v. Frost*, 9 C. & P. 183; *Beeching v. Gower*, Holt, N. P. R. 314, per Gibbs, C. J.; *Howell v. Lock*, 2 Camp. 14; *Donelson v. Taylor*, 8 Pick. 390, 392. In *Yardley v. Arnold*, 10 M. & W. 145, Parke, B., observed, "cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise objections to his competency; I think all such should be put to him on the *voire dire*; and that, when once sworn in chief, his competency should be taken for granted; but certainly the practice has been different hitherto." See, also, *Hartshorne v. Watson*, 5 Bing.

been disputed by the Court of Exchequer,¹ and the learned Barons have held, in conformity with some old decisions,² that the objection may be *raised at any time during the trial*, and that, too, whether the objector previously knew of the disqualification or not. The Court for Crown Cases Reserved has also decided that a judge had acted rightly, who, after pronouncing a witness competent on the *voire dire*, discovered during the examination that he was really incompetent, and consequently rejected his testimony, though part of it had already been reduced to writing.³ The rule on this subject is the same in equity as at law,⁴ and in criminal as in civil cases;⁵ but, perhaps, in trials for high treason, the old doctrine would be recognised, that if the prisoner intends to object to a witness as being omitted from, or misdescribed in, the list furnished to him, he must do so before the witness is sworn in chief.⁶ In ordinary cases, if the objection to the competency of a witness be not taken until *after the trial*, it will be considered as coming too late; and the courts will not grant a new trial for this cause alone,⁷ unless the incompetency were known and concealed by the party producing the witness,⁸ or other evidence can be given of *mala praxis* on his part.⁹

N. C. 477; 7 Scott, 494, S. C.; *Wollaston v. Hakewill*, 3 M. & Gr. 297; 3 Scott, N. R. 593, S. C.; and *Flagg v. Mann*, 2 Sumn. 487.

¹ *Jacobs v. Layborn*, 11 M. & W. 685.

² *Needham v. Smith*, 2 Vern. 463; *Ld. Lovat's case*, 18 How. St. Tr. 596. See, also, *Stone v. Blackburn*, 1 Esp. 37; *Yardley v. Arnold*, C. & Marsh. 437, 438, per Parke, B.

³ *R. v. Whitehead*, 35 L. J., M. C. 186; 1 Law Rep., C. C. 33; 10 Cox, 234, S. C.

⁴ *Needham v. Smith*, 2 Vern. 463; *Vaughan v. Worrall*, 2 Madd. 322; 2 Swanst. 400, S. C.; *Selway v. Chappell*, 12 Sim. 113; *Swift v. Dean*, 6 Johns. 523, 538; *Gresl. Ev.* 234—236. See *Bousfield v. Mould*, 1 De Gex & Sm. 347.

⁵ *Ld. Lovat's case*, 18 How. St. Tr. 596; *Com. v. Green*, 17 Mass. 538.

⁶ *R. v. Watson*, 2 Stark. R. 158; 32 How. St. Tr. 496, 497, S. C.; *R. v. Frost*, 9 C. & P. 183.

⁷ *Turner v. Pearte*, 1 T. R. 717; *Jackson v. Jackson*, 5 Cowen, 173. But see 11 M. & W. 691. In *Barbat v. Allen*, 21 L. J., Ex. 156, Parke, B., referred to the Irish case of *Birch v. Somerville*, cited *ante*, § 1380, in which *Ld. Clarendon* was examined without being sworn, but the objection not having been insisted on at the time, the court refused to disturb the verdict.

⁸ *Niles v. Brackett*, 15 Mass. 378.

⁹ *Wade v. Simeon*, 2 Com. B. 342.

§ 1393. With respect to the *mode* of taking the objection, the witness should, in strictness, be examined upon the *voire or vraie dire*; that is, he should be sworn to answer truly "all such questions as the court shall demand of him." This peculiar form of oath is, however, now seldom administered; and the facts on which the objection rests, if not admitted by the opposite side, are elicited by questions put to the witness after being sworn in chief.¹ Upon such an examination, the witness, if it be necessary, may speak to the contents of written documents without producing them.² The objection may perhaps be also supported by evidence aliunde.

¹ See *Jacobs v. Layborn*, 11 M. & W. 685.

² See *Butler v. Carver*, 2 Stark. R. 433; *R. v. Gisburn*, 15 East, 57; *Lunniss v. Row*, 10 A. & E. 606; *Carlisle v. Eady*, 1 C. & P. 234; *Quarterman v. Cox*, 8 C. & P. 97; *Butchers' Co. v. Jones*, 1 Esp. 160; *Botham v. Swingler*, id. 164; *Pea. R.* 218, S. C.; *Brockbank v. Anderson*, 7 M. & Gr. 295, 313.

CHAPTER III.

EXAMINATION OF WITNESSES.

§ 1394. HAVING thus treated of the means of procuring the attendance of witnesses, and of their competency and credibility, the next subject to be considered is their examination. And here it may be laid down as a general proposition, that, "in the absence of any *agreement in writing* between the solicitors of all parties, and subject to the Rules of 1883, the witnesses at the *trial of any action, or at any assessment of damages*, shall be examined *vivâ voce and in open court*."¹ In dealing with this rule it will be convenient, at the outset, to clear the ground of the exceptions embodied in it. And first, as to the agreement between the parties themselves to dispense with *vivâ voce* testimony. This, it will be seen, must be in writing, and, according to the strict language employed, should be made "between the solicitors of all parties." But suppose one of the parties has no solicitor, what is then to happen? Probably the stringency of the rule would be relaxed in his favour; and it may be, that a similar relaxation would be allowed, in the event of any party under disability appearing by a next friend or a guardian.² It also seems that, although the parties have consented that the evidence at the trial should be taken by affidavit, either of them may, unless the agreement states that affidavits *alone* shall be used, supplement the documentary proof by oral testimony.³ Moreover, notwithstanding the agreement, the court, in the event of such a course being deemed necessary in the interests of justice, as, for instance, if the

¹ Rules of Sup. Ct., 1883, Ord. XXXVII., R. 1. See *Att.-Gen. v. Metrop. Dist. Ry. Co.*, L. R., 5 Ex. D. 218, per Ct. of App.

² See *Knatchbull v. Fowle*, L. R., 1 Ch. D. 604, per Jessel, M. R.; *Fryer v. Wiseman*, 45 L. J., Ch. 199.

³ *Glossop v. Heston & Isleworth Local Bd.*, 47 L. J., Ch. 536, per Malins, V.-C.

rights of infants be involved in the inquiry,—has authority, *ex meri motu*, to exclude the affidavits altogether,¹ although they may have been duly taken and regularly filed, and to direct that they shall not be used as evidence at the trial, but that the witnesses themselves shall attend, and be examined orally in open court.²

§ 1395. We next come to the cases, where the Rules of 1883 interfere with the proposition stated in the last section; and here it is proposed to let the rules speak for themselves. First comes Order XXXVII., R. 1, which provides, that “the court or a judge may, at any time for *sufficient reason*,³ order that any particular fact or facts may be proved by affidavit; or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable; or that any witness whose attendance in court ought, for some sufficient cause, to be dispensed with, be examined by interrogatories or otherwise, before a commissioner or examiner. Provided that, where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for *cross-examination*, and that such witness can be produced, an order shall *not* be made authorising the evidence of such witness to be given by affidavit.” In accordance with this last proviso, the court has refused to allow affidavits, which had already been used on an interlocutory application, to be read at the hearing, though it was proposed to supplement them by the oral evidence of the deponents and by their cross-examination.⁴

§ 1396. The next rule is contained in Order XXXVIII., R. 1, which provides, that, “upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.” It seems

¹ Sed qu. as to this proposition; for how can counsel be constrained from asking the witnesses on cross-examination whether they had not stated the facts differently in the affidavits then produced for their inspection?

² Lovell v. Wallis, 53 L. J., Ch. 495, per Kay, J.

³ The Probate Division has declined to order the execution and attestation of a will to be proved in solemn form by affidavit, though none of the parties cited had appeared. Cook v. Tomlinson, 24 W. R., P. D. 851.

⁴ Blackburn Guard. v. Brooks, L. R., 7 Ch. D. 68, per Fry, J.; 47 L. J. Ch. 156, S. C.

that, under the latter portion of this rule, the right to cross-examine the deponent would continue, though the affidavit were subsequently withdrawn by the party who had filed it.¹

§ 1396A. Order XXXVII., R. 2, provides, that, "in default actions in rem, and in references in Admiralty actions, evidence may be given by affidavit." This rule, it will be seen, differs from the last, as it omits the proviso for the cross-examination of the deponents. Perhaps, however, that omission is immaterial; for by another general rule, viz., Order XXXVIII., R. 28, it is provided, that, "when the evidence is taken by affidavit, any party desiring to cross-examine a deponent, who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence, unless by the special leave of the court or a judge. The party producing such deponent for cross-examination, shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production." This last clause will not apply to a case, where the deponent is cross-examined before the chief clerk at chambers, or before a special examiner, but is confined to his cross-examination before the court at the trial.² The party receiving notice under the above rule, is, by Rule 29, "entitled to compel the attendance of the deponent for cross-examination, in the same way as he might compel the attendance of a witness to be examined."

§ 1396B. Whenever affidavits are used they must be "confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his

¹ See *Keogh v. Leonard*, 11 Eq. 365; *Re Quartz Hill Co.*, ex p. *Young*, L. B., 21 Ch. D. 642, per Ct. of App.; 51 L. J., Ch. 940, S. C.

² In *re Knight*, *Knight v. Gardner*, 53 L. J., Ch. 183, per Ct. of App.; S. C., L. R., 25 Ch. D. 297; overruling S. C., L. R., 24 Ch. D. 606.

belief, *with the grounds thereof*, may be admitted.”¹ The exception here mentioned does not apply to any proceeding, which, though interlocutory in form, finally decides the rights of the parties; and if, in any such proceeding, an affidavit founded on information and belief be used, the party against whom it is adduced is not bound to contradict it, but he may treat it as evidence which is not admissible.² In the event, however, of his not taking that course in the court below, he may be precluded from raising the objection before the Court of Appeal.³

§ 1396c. In order to check prolixity or scurrility in affidavits, it is further provided by the Rules, first, that “the costs of every affidavit, which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same;”⁴ and next, that “the court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client.”⁵

§ 1396d. With the view of protecting as far as possible the court, when called upon to act on the evidence of affidavits, from being deceived either by intentional and direct falsehood, or by statements designedly coloured, or accidentally mis-recited,⁶ the following rules have been made:—

R. 8. “Every affidavit shall state the description and true place of abode of the deponent;” thus enabling the party against whom the affidavit is used, to make all necessary inquiries respecting the deponent’s character and position in life.

R. 12. “No affidavit having in the jurat or body thereof any

¹ Ord. XXXVIII., R. 3. See *Bidder v. Bridges*, L. R., 26 Ch. D. 1, per Ct. of App.; 53 L. J., Ch. 479, S. C., as to what affidavits will not satisfy the requirements of this rule.

² *Gilbert v. Endean*, L. R., 9 Ch. D. 259, per Ct. of App. ³ Id.

⁴ R. 3; *Walker v. Poole*, L. R., 21 Ch. D. 835, per Kay, J.; 51 L. J., Ch. 840, S. C.; *Hill v. Hart-Davis*, L. R., 26 Ch. D. 470, per Ct. of App.

⁵ R. 11.

⁶ See *D. of Northumberland v. Todd*, L. R., 7 Ch. D. 777, per Hall, V.-C. 47 L. J., Ch. 343, S. C.

interlineation, alteration, or erasure, shall without leave of the court or a judge be read or made use of in any matter depending in court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures, appearing at the time of taking the affidavit to be written on the erasure, are rewritten and signed or initialled in the margin of the affidavit by the officer taking it."

R. 13. "Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent."

§ 1396E. All affidavits, sworn in England¹ for the purpose of proceedings in the Supreme Court, must be sworn either before a judge, or a district registrar,² or a master, or the first or second clerk in the Filing or Record Department of the Central Office,³ or a chief clerk in the Chancery Division,⁴ or a Commissioner to examine witnesses,⁵ or a Commissioner to administer oaths.⁶ These last-named commissioners must also, in the jurat, "express the time when, and the place where," each affidavit has been taken, for "otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled, without the leave of the court or a judge."⁷ Still, the Rules do not require that the person administering the oath should, in addition to signing his name, add, in the jurat, his title as Commissioner.⁸

¹ As to affidavits sworn out of England, see Ord. XXXVIII., R. 6, cited ante, § 12.

² Ord. XXXVIII., R. 4.

³ Ord. LXI., R. 5.

⁴ Ord. LV., R. 16.

⁵ Ord. XXXVII., R. 19.

⁶ Ord. XXXVIII., R. 4.

⁷ Id., R. 5.

⁸ Ex p. Johnson, re Chapman, 53 L. J., Ch. 762, on App., S. C., L. R., 26 Ch. D. 338; Cheney v. Courtois, 13 Com. B., N. S. 634.

§ 1396f. Under Rules 16 and 17 no affidavit shall be sufficient, if sworn before the solicitor acting for the party on whose behalf it is to be used, or before such solicitor's clerk, or partner, or agent, or correspondent, or before the party himself.

Rule 15 provides, that original affidavits, before being used, must be delivered to the proper officer for the purpose of being stamped and filed; but after an affidavit has been filed, an office copy of it, if duly authenticated with the seal of the office, "may in all cases be used." Notwithstanding, however, this general language, an affidavit that has been filed "before issue joined in any cause or matter," cannot, without leave of the court or a judge, be received at the hearing or trial, unless, within a month after issue joined, or further time specially allowed, notice in writing of its intended use be given by the one party to the other.¹

§ 1369g. Rules relating to affidavits, and corresponding in substance though not in words with those referred to in the last six sections, have been framed for use in the Bankruptcy Courts,² and also in the Court for Divorce and Matrimonial Causes.³

§ 1397. The rules on the subject of *vivâ voce* testimony, and affidavit evidence, which prevail in the county courts, are also substantially the same as those recognised in the Supreme Court, though expressed in different language. Order XIV. of the County Court Rules, 1875, provides, by Rule 3, that "except where otherwise provided by these Rules, the evidence of witnesses shall be taken *vivâ voce on oath*, according to the former practice on the trial of plaints. Where by these Rules evidence is required or permitted to be taken by affidavit, such evidence may be taken *vivâ voce* on oath, if the judge or registrar shall at the hearing of any application or otherwise so direct." Rule 6 then provides, that, "where a party desires to use at the trial an affidavit by any particular witness, or an affidavit as to particular facts, he may, five clear days before the hearing, give a notice, with a copy of such affidavit annexed, to the party against whom such affidavit is to be used; and unless such last-mentioned party shall within two clear days

¹ Ord. XXXVII., R. 24.

³ Bkptey. Rules, 1883. RR. 39—50.

² Rules in Div. & Mat. Causes, RR. 138—146, 188. See also RR. 52—55. (4061)

give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the use thereof, unless the judge shall otherwise order.”¹

§ 1398. Besides the Supreme Courts, whether for England or Ireland, and the County Courts, the Legislature has conferred on many other tribunals² power to examine witnesses *vivâ voce*, whenever such a course shall be deemed desirable; and the tendency of judicial reform,—as at present understood,—is unquestionably to discountenance written evidence, and to substitute for it in all important inquiries testimony by word of mouth.

§ 1399. Passing on now to the cases in which *vivâ voce* evidence is required to be given, it becomes necessary to consider the *manner* in which witnesses ought to be *examined*. This subject lies chiefly in the discretion of the judge before whom the action is tried,³ being from its very nature susceptible of but few positive rules. The great object is to elicit the truth; but the character, intelligence, courage, interest, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the mode of interrogation, and the degree of its intensity, to attain that end. § 1258

§ 1400.⁴ If the judge deems it essential to the discovery of truth, that the witnesses should be *examined out of the hearing of each other*, he will order them all on both sides to withdraw, excepting the one under examination;⁵ and this order, upon the motion of either party at any period of the trial,⁶ is rarely withheld, though § 1259

¹ See further as to the Form and other requisites of affidavits when used in the County Courts, R. R. 37—41 of Ord. XXXVII.

² See as to the Jud. Comm. of the Privy Council, 3 & 4 W. 4, c. 41, § 7; as to the Eccles. Cts., 17 & 18 V., c. 47; as to the Ct. of Adm. for Irel., 30 & 31 V., c. 114, § 50, Ir.; and as to the Cts. of Bankr. in Eng., 46 & 47 V., c. 52, § 105, subs. 5; and in Irel., 20 & 21 V., c. 60, § 369, Ir. See, too, Reg. Gen. of 1877 for Consist. Ct. of Lond., Ord. IX., R. 1, cited L. R., 2 P. D. 378.

³ *Bastin v. Carew*, Ry. & M. 127, per Abbott, C. J.

⁴ Gr. Ev. 432, in part.

⁵ This order may, it seems, be made by the examiner. See in re West of Canada Oil Land & Works Co., 46 L. J., Ch. 684, per Jessel, M. R.

⁶ *Southey v. Nash*, 7 C. & P. 632.

it cannot be demanded of strict right.¹ The parties themselves will sometimes be included in the order to withdraw,² as will also the prosecutor in a criminal proceeding, if it be proposed to examine him as a witness.³ Where, however, a solicitor in the cause is about to give testimony, an exception is usually allowed in his favour, upon a statement being made by counsel, that his personal attendance in court is necessary.⁴ So, medical or other professional witnesses, who are summoned to give scientific opinions upon the circumstances of the case, as established by other testimony, will be permitted to remain in court, until this particular class of evidence commences; but then, like ordinary witnesses, they will have to withdraw, and to come in one by one so as to undergo a separate examination.⁵

§ 1401.⁶ If a witness remains in court in contravention of an order to withdraw, he renders himself liable to fine and imprisonment for the *contempt*; ^{§ 1260} and, at one time, it was considered that the judge, in the exercise of his discretion, might even exclude his

¹ In *Southey v. Nash*, 7 C. & P. 632, Alderson, B., is reported to have held, that either party had a right to require that the unexamined witnesses should be out of court; but this ruling would seem not to be law, even in civil cases, see *Selfe v. Isaacson*, 1 Fost. & Fin. 194, per Byles, J.; and the contrary has repeatedly been held in criminal trials, see *R. v. Cook*, 13 How. St. Tr. 348, per Treby, C. J.; *R. v. Vaughan*, id. 494, per Ld. Holt; *R. v. Goodere*, 17 id. 1015, per Sir M. Foster. In *R. v. Murphy*, 8 C. & P. 307, Coleridge, J., observed, that it was almost a matter of right for the opposite party to have a witness out of court, while any legal argument was going on respecting his evidence. A witness will not be ordered out of court during the reading of evidence on affidavit. *Penniman v. Hall*, 24 W. R., Ch. D., per V.-C. Hall, 245.

² In *Charnock v. Devings*, 3 C. & Kir. 378, Talfourd, J., is reported to have held that he had no power to order the parties to leave the court so long as they behaved with propriety. See, also, *Selfe v. Isaacson*, 1 Fost. & Fin. 194, per Byles, J. Sed qu. as to this ruling.

³ *R. v. Newman*, 3 C. & Kir. 260, per Ld. Campbell.

⁴ *Everett v. Lowdham*, 4 C. & P. 91, per Bosanquet, J.; *Pomeroy v. Baddeley*, Ry. & M. 430, per Littledale, J. But a special application must be made to except him, *R. v. Webb*, Ry. & M. 431, n.

⁵ See *Alison*, Pract. Cr. L. 489, 542—545; *Tait*, Ev. 420.

⁶ Gr. Ev. § 432, in part.

⁷ *Chandler v. Horne*, 2 M. & Rob. 423.

testimony.¹ But it seems to be now settled, that the judge has *no right to reject the witness* on this ground, however much his wilful disobedience of the order may lessen the value of his evidence.² In *revenue cases*, indeed, as tried on the Revenue side of the Queen's Bench Division, a stricter rule is said to prevail; and in order to prevent any imputation of unfairness in these delicate proceedings between the Crown and the subject, the testimony of any witness who has remained in court, whether contumaciously or not, after an order to withdraw, has hitherto been inflexibly rejected.³ This rule does not prevail in Ireland, at least in all its strictness;⁴ and as it may well be doubted whether the rule in itself is calculated to effect its object, perhaps, at the present day, it would not be rigidly enforced, even in England.

§ 1402. The practice of ordering witnesses out of court may be traced to a remote antiquity, it being noticed with approbation by Fortescue in his work *De Laudibus Legum Angliæ*;⁵ and no man who has reflected upon the nature of evidence, or even read the quaint story of Susannah narrated in the Apocrypha,⁶ but must acknowledge the utility of such a course, as an admirable means of detecting conspiracy and falsehood. In order, however, to render the practice duly efficient, it is not enough to order the

¹ *Parker v. M'William*, 6 Bing. 683; 4 M. & P. 480, S. C.; *Thomas v. David*, 7 C. & P. 350; *R. v. Colley*, M. & M. 329; *Beamon v. Ellice*, 4 C. & P. 585; *R. v. Wylde*, 6 C. & P. 380; *R. v. Lavin*, Ir. Cir. R. 813, per Perrin, J., and Richards, B.

² *Chandler v. Horne*, 2 M. & Rob. 423, per Erskine, J., who stated that it was so settled by all the judges. See, also, *Cook v. Nethercote*, 6 C. & P. 743, per Alderson, B.; *Doe v. Cox*, id. in n.; 1 Clifford's Southwark Election Cas. 114, S. C.; *Cobbett v. Hudson*, 22 L. J., Q. B. 13, per Ld. Campbell; 1 E. & B. 14, S. C.

³ *Att.-Gen. v. Bulpit*, 9 Price, 4; *Parker v. M'William*, 6 Bing. 683; *Thomas v. David*, 7 C. & P. 351, per Coleridge, J.

⁴ *Att.-Gen. v. Sullivan*, 1 Arm. M. & O. 294, per Brady, C. B.

⁵ His words are, "Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum." C. 26. See, also, *Williams v. Hulie*, 1 Sid. 131; *Swift*, Ev. 512.

⁶ Where Daniel detected the perjury of the two old judges, who, as eye-witnesses, had accused the wife of Joacim of adultery; but who, on being examined apart, differed as to the place where the crime was committed, the one swearing it was under a mastick tree, the other under a holm tree.

witnesses simply to withdraw out of hearing, but means should be afforded for keeping them in some separate room, until they are called for; so that they might lose the opportunity, not only of listening to the examination of those who preceded them, but, what is of equal importance, of conversing with them afterwards. In Scotland,¹ all the witnesses on either side are usually shut up in an apartment by themselves, whence they are successively and separately called into court to be examined;² and the system of separate examination also prevails theoretically, if not practically, in both Houses of Parliament.³

§ 1403. When the competency of a witness, if objected to, is settled, he is first duly sworn in the cause by the crier⁴ or other officer of the court. If he decline either to take the proper oath,⁵ or to make the proper affirmation, or if, after having been sworn, he refuse to give evidence, or to answer any question which the court holds that he is bound by law to answer, he is guilty of contempt, and may be punished accordingly. When such an offence is committed before any Division of the Supreme Court,⁶ § 1262

¹ It was formerly the law of Scotland, that if a witness was objected to as having remained in court without permission, his evidence could not be heard, but the Act of 3 & 4 V., c. 59, § 3, enacts, that "in any trial before any judge of the court of session or court of justiciary, or before any sheriff or steward of Scotland, it shall not be imperative on the court to reject any witness against whom it is objected that he or she has, without the permission of the court, and without the consent of the party objecting, been present in court during all or any part of the proceedings; but it shall be competent for the court, in its discretion, to admit the witness, where it shall appear to the court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."

² Alison, *Pract. of Cr. L.*, 542—545; Tait, *Ev.* 420; 2 Hume, *Com.* 189; 19 How. *St. Tr.* 331, n.

³ *Taylor v. Lawson*, 3 C. & P. 543, per Best, C. J.

⁴ *R. v. Tew*, Pearce & D. 429.

⁵ If in an administration suit an accounting party be subpoenaed for examination, he cannot refuse to be sworn on the ground that he has not received sufficient notice of the points on which he is to be examined, but after being sworn he may,—according to what would seem to be an absurd rule,—object to answer for that reason. *Meyrick v. James*, 46 L. J., Ch. 38. See *Rules of Sup. Ct.*, 1883, Ord. XXXIII., R. 5.

⁶ See *Ex p. Fernandez*, 10 Com. B., N. S. 3; *Ex p. Clement*, 11 Price, 68, 85.

the refractory witness may be punished *instanter* by fine and imprisonment; nor is it necessary that the cause of commitment should be set out at length in the warrant.¹ When a witness is guilty of a similar contempt before an inferior tribunal, the mode of dealing with him will in general depend upon the statutable powers with which the particular court is clothed;² but in all cases a refusal to discharge the duties of a witness is regarded in the light of a grave offence, as having a tendency to obstruct the course of public justice.

§ 1404. As soon as the witness has been duly sworn, it is § 1262A the province of the party by whom he is produced to examine him.³ This is called his *direct examination*, or his *examination in chief*; and in this examination, *leading questions*,—that is, questions which suggest to the witness the answer desired,⁴ or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative,⁵—are not, in general, allowed to be put.⁶ Still, this rule must be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, the examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the

¹ Ex p. Fernandez, 10 Com. B., N. S. 3. There the witness was fined £500, and sentenced to six months' imprisonment.

² See as to the County Courts, 9 & 10 V., c. 95, § 86, which enables the judge to impose a fine not exceeding £10 on the witness.

³ Formerly in the Scotch courts, as soon as a witness was sworn, it was necessary for the judge to examine him *in initialibus*, that is, to ask him whether he had been instructed what to say, or had received or had been promised any good deed for what he was to say, or whether he bore any ill-will to the adverse party, or had any interest in the cause, or concern in conducting it; together with his age, and whether he was married or not, and the degree of his relationship to the party adducing him, Tait, Ev. 424; but now this course is no longer *necessary*, though it is still *competent* for the judge, or for the party against whom the witness shall be called, to examine him *in initialibus*, as heretofore, 3 & 4 V., c. 59, § 2.

⁴ 1 St. Ev. 169; 2 Ph. Ev. 401; Alison, Pract. of Cr. L. 545; Tait, Ev. 427; 24 How. St. Tr. 659, 660. n.

⁵ Nicholls v. Dowding, 1 Stark. R. 81, per Ld. Ellenborough.

⁶ For an early instance, see R. v. Rosewell, 10 How. St. Tr. 190; as to what will be regarded as leading interrogatories, see Gregory v. Marychurch, 12 Beav. 398; Lincoln v. Wright, 4 Beav. 166.

counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to the part of the examination,¹ which is merely introductory of that which is material. With respect even to material points, the judge, in his discretion, will sometimes allow leading questions to be put in a direct examination; as, for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested for the other party, or unwilling to give evidence.² Indeed, if the witness stand in a situation, which of necessity makes him adverse to the party calling him, as, if he be a defendant whom the plaintiff wishes to examine, leading questions may, it seems, be asked him as a matter of right.³ So, where on the trial of an issue *devisavit vel non*, directed by the old Court of Chancery, the plaintiff, in obedience to the rule of that Court, called the second attesting witness, whose evidence tended to prove the insanity of the testator, he was allowed to put questions to him in the nature of a cross-examination; because, in that case, as the witness was rather the witness of the Court than of the party, it was felt that considerable latitude in the mode of conducting the examination should, in common fairness, be permitted.⁴

§ 1405. Again, a witness will occasionally be allowed to be led, § 1263 where an omission in his testimony is evidently caused by *want of recollection*, which a *suggestion* may assist. Thus, when a witness stated that he could not recollect the names of the members of a firm, so as to repeat them without suggestion, but thought that he might possibly recognise them if suggested, this was permitted to be done.⁵ So, for the purpose of identification, the witness may be directed to look at a particular person, and say whether he is

¹ Nicholls v. Dowding, 1 Stark. R. 81, per Ld. Ellenborough.

² R. v. Chapman, 8 C. & P. 559, per Ld. Abinger; R. v. Ball, id. 745; R. v. Murphy, id. 306—308, per Coleridge, J.; Clarke v. Saffery, Ry. & M. 126, per Best, C. J.; Parkin v. Moon, 7 C. & P. 409, per Alderson, B.

³ Clarke v. Saffery, Ry. & M. 126.

⁴ Bowman v. Bowman, 2 M. & Rob. 501, per Cresswell, J.

⁵ Acerro v. Petroni, 1 Stark. R. 100, per Ld. Ellenborough.

the man.¹ So,² where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it; as, where he is called to contradict another respecting the contents of a lost letter, and cannot, off-hand, recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted.³ So, where a witness is called to contradict another, who has denied having used certain expressions, counsel are sometimes permitted to ask, whether the particular words denied were not in fact uttered by the former witness;⁴ but this rule seems only to apply to such expressions as in themselves are not evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible.⁵ Again, the court will sometimes allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation;⁶ and indeed, it must always be remembered, that the judge has a discretionary power,—not controllable by the Court of Appeal,⁷—of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require.⁸

§ 1406.⁹ Though a witness can testify only to such facts as are within his own knowledge and recollection, he is sometimes permitted to *refresh* and assist his *memory*, *by the use of a written instrument*, memorandum, or entry in a book.¹⁰ But this course,—

¹ R. v. Watson, 32 How. St. Tr. 74, per Ld. Ellenborough; 2 Stark. R. 128, S. C.; R. v. Berenger, 2 Stark. R. 129, n., per id.

² Gr. Ev. § 435, in part.

³ Courteen v. Touse, 1 Camp. 43, per Ld. Ellenborough.

⁴ Edmonds v. Walter, 3 Stark. R. 8, per Abbott, C. J.

⁵ Hallett v. Cousens, 2 M. & Rob. 238, per Erskine, J.

⁶ Moody v. Rowell, 17 Pick. 498.

⁷ See Lawdon v. Lawdon, 5 Ir. Law R., N. S. 27.

⁸ Moody v. Rowell, 17 Pick. 498.

⁹ Gr. Ev. §§ 436, 438, in part.

¹⁰ The law on this subject is thus laid down in the N. York Civ. Code, § 1843:—“A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred

except in the case of scientific witnesses referring to professional books as the foundation of their opinion,¹—can only be adopted where the writing has been made, or its accuracy recognised, at the time of the fact in question, or, at farthest, so recently afterwards, as to render it probable that the memory of the witness had not then become defective.² In one Scotch case, the majority of the court would not allow a witness to consult notes, which he had prepared *some weeks* after the transaction had occurred, and when he had reason to believe that he should be called to give evidence.³ And, in another case, the witness was not permitted to refresh his memory with the copy of a paper taken by himself *six months* after he had made the original, though the original was proved to have become illegible; the learned judge saying, that the witness could only look at the original memorandum made *near* the time.⁴

§ 1407. In all cases of this kind the practice must be governed § 1264 by the peculiar circumstances; but, perhaps, if the witness will swear positively, that the notes, though made *ex post facto*, were taken down at the time when he had a distinct recollection of the facts there narrated, he will in general be allowed to use them, though they were drawn up a considerable time after the transactions had occurred.⁵ If however, the memorandum were prepared

or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence must be received with caution.” § 159 of the Ind. Ev. Act, 1872, is as follows:—“A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.”

¹ As to this practice, see post, §§ 1422, 1423.

² *R. v. Horne Tooke*, cited 25 How. St. Tr. 936; *Burrough v. Martin*, 2 Camp. 112; *Smith v. Morgan*, 2 M. & Rob. 257; *Wood v. Cooper*, 1 C. & Kir. 645.

³ *R. v. Sir A. Gordon Kinloch*, 25 How. St. Tr. 934—937.

⁴ *Jones v. Stroud*, 2 C. & P. 196, per Best, C. J.

⁵ *R. v. Sir A. Gordon Kinloch*, 25 How. St. Tr. 937; *Wood v. Cooper*, 1 C. & Kir. 646, per Pollock, C. B.

subsequently to the event at the instance of the party calling the witness, or of his solicitor, they can in no case be permitted to be used, for otherwise a door might be opened to the grossest fraud. Therefore, where a witness had drawn up a paper for the party calling him, after the cause was set down for trial, though eighteen months before the trial was actually heard, the court would not allow him to refer to it.¹ And where a witness had herself noted down the transactions as they occurred, but had requested the solicitor for the party she supported to digest her notes into the form of minutes, which she had afterwards revised and transcribed, Lord Chancellor Hardwicke indignantly suppressed her deposition, she having had recourse to these minutes for the purpose of refreshing her memory.²

§ 1408. Whether the witness can refresh his memory by refer- § 1265
ring to a mere *copy* of his original memorandum is a question of some difficulty and doubt.³ In several cases he has been allowed to do so, where, having looked at the copy, he was enabled to swear positively to the facts from *his own recollection*; ⁴ but here it must be presumed, though some of the reports are silent on the subject, that the copy was made from the notes of the witness, either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy.⁵ Even then, it may be questionable whether the copy should be used, so long as the original is in existence, and its absence unexplained; for there is much weight in the remark of Mr. Justice Patteson, that the rule requiring the production of the best evidence is equally

¹ *Steinkeller v. Newton*; 9 C. & P. 315, per Tindal, C. J.

² *Anon.*, cited by *Ld. Kenyon* in *Doe v. Perkins*, 3 T. R. 752—754. See *Sayer v. Wagstaff*, 5 Beav. 462.

³ The law on this subject is thus laid down in § 159 of the Indian Evid. Act of 1872:—"Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of such document: provided the court be satisfied that there is sufficient reason for the non-production of the original."

⁴ *Tanner v. Taylor*, cited per Buller, J., in *Doe v. Perkins*, 3 T. R. 754, as decided by Legge, B.; *Anon.*, per Bayley, J., 1 Lew. C. C. 101; *Duch. of Kingston's case*, 20 How. St. Tr. 619; *R. v. Hedges*, 28 How. St. Tr. 1367.

⁵ *Ld. Talbot v. Cusack*, 17 Ir. Law R., N. S. 213.

applicable, whether a paper be produced as evidence in itself, or be merely used to refresh the memory.¹

§ 1409. Be this as it may, thus much seems clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness have no *independent* recollection of the facts narrated therein, the original must be used.² The case of *Burton v. Plummer*³ in no way contravenes this rule. There, the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a ledger. The transactions in trade had been noted by the clerk in a waste-book as they occurred, and the plaintiff, day by day, had copied the entries into the ledger, each entry being at the time checked by the clerk. Under these circumstances, the court very properly regarded the ledger as an original, and allowed the witness to refresh his memory thereby, without accounting for the absence of the waste-book. So, in *Horne v. Mackenzie*,⁴ where a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers, and compiled from his original notes, of which it was substantially, though not verbally, a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid.

§ 1410. Before a witness can refresh his memory by looking at memoranda, it seems to be further necessary that they should have been made, either *by the witness* himself, or *by some person in his presence*,⁵ or, at least, that he should have examined them

¹ *Burton v. Plummer*, 2 A. & E. 344. See, also, *Jones v. Stroud*, 2 C. & P. 196.

² *Doe v. Perkins*, 3 T. R. 749; explained by Patteson, J., in 2 A. & E. 215; *R. v. Hedges*, 28 How. St. Tr. 1367, per Ld. Ellenborough; *Solomons v. Campbell*, cited 1 St. Ev. 177, 178, n., per Abbott, C. J.; *Beech v. Jones*, 5 Com. B. 696; *Alcock v. The Roy. Exch. Ins. Co.*, 13 Q. B. 292.

³ 2 A. & E. 341. See Ld. Talbot *v. Cusack*, 17 Ir. Law R., N. S. 213.

⁴ 6 Cl. & Fin. 628, 630, 645. See, also, *Topham v. Macgregor*, 1 C. & Kir. 320, where the writer of an article in a newspaper was allowed to refresh his memory by the paper, his MS. being proved to be lost.

⁵ *Duch. of Kingston's case*, 20 How. St. Tr. 619.

while the facts were fresh in his memory, and should then have known that the particulars therein mentioned were correctly stated.¹ In accordance with the last part of this rule, a witness has been allowed to refer to a log-book, which, though not written by himself, had from time to time, and while the occurrences were recent, been examined by him;² and the same course has been pursued with respect to a workman's time-book, which the pay-clerk had acted upon in paying the weekly wages.³ So, where it has been material to prove the date of an act of bankruptcy, the court has several times permitted witness to refer to their depositions, taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them.⁴ So, where a witness called on behalf of a prosecution makes a statement in his examination in chief inconsistent with what he has previously sworn before the magistrates, or the coroner, the counsel for the Crown may show him his deposition, for the purpose of refreshing his memory, and may then repeat the question in a leading form.⁵ Again, if the witness has checked an entry made by another person;⁶ or has actually seen money paid and a receipt given;⁷ or has read a memorandum to a party who had assented to its terms;⁸ in all these, and the like cases, he will be allowed to look at the document itself, for the purpose of refreshing his memory as to the facts mentioned therein. In one or two cases a greater latitude is said to have prevailed; and witnesses are reported to have been allowed to refresh their memories from the brief notes of counsel taken at a former trial, provided they could afterwards speak from recollection, and not merely from the notes.⁹ These cases, how-

¹ See ante, p. 1198, n. ¹⁰.

² *Burrough v. Martin*, 2 Camp. 112, per Ld. Ellenborough; *Anderson v. Whalley*, 3 C. & Kir. 54.

³ *R. v. Langton*, 13 Cox, 345, per Ct. of Cr. App.; 46 L. J., M. C. 136; & L. R., 2 Q. B. D. 296, S. C.

⁴ *Smith v. Morgan*, 2 M. & Rob. 257, per Tindal, C. J.; *Wood v. Cooper*, 1 C. & Kir, 645, per Pollock, C. B.; *Vaughan v. Martin*, 1 Esp. 640, per Ld. Kenyon.

⁵ *R. v. Williams*, 6 Cox, 343, per Williams J.

⁶ *Burton v. Plummer*, 2 A. & E. 341.

⁷ *Rambert v. Cohen*, 4 Esp. 213, per Ld. Ellenborough.

⁸ *Bolton, Ld., v. Tomlin*, 5 A. & E. 856; *Jacob v. Lindsay*, 1 East, 459; *R. v. St. Martin's, Leicester*, 2 A. & E. 210.

⁹ *Lawes v. Reed*, 2 Lew. C. C. 152, per Alderson, B., citing *Balme v. Hutton*, as a similar case. See, also, *Henry v. Lee*, 2 Chit. R. 124.

ever, can scarcely be regarded as authorities, and are certainly opposed in spirit to a decision of Lord Tenterden's,¹ where a witness, having denied on cross-examination that he was ever sentenced to imprisonment, was not permitted under the old law to have his memory refreshed by a copy of his conviction.²

§ 1411. As a writing, used to refresh the memory, does not thereby become evidence of itself,³ it is *not necessary* that it should even be *admissible*; and therefore a receipt which cannot be read for want of a stamp, may yet be referred to by the witness in giving his evidence.⁴ Neither is it essential that notes used by a witness, who is called to prove a conversation, a speech, or the like, should contain a verbatim account of all that was uttered. Thus, where it appeared that a short-hand writer had taken a verbatim note of such parts of an address as he deemed material, and was merely able to swear to the substantial correctness of the remainder, he was permitted to read the whole; though it was strongly urged that, as by the witness's own showing the note was a *partial* one, the fulness and consequent accuracy of which rested on his private opinion of the materiality of what was spoken, he was not entitled to use it at all, but was bound to depend on his memory alone.⁵ If the witness has become *blind*, the paper may be read over to him, for the purpose of exciting his recollection.⁶ § 1268

§ 1412. In order that a document may be used as the refresher of memory, it is by *no means necessary* that the witness, after having seen it, should have any *independent recollection* of the facts mentioned therein, or connected therewith; but it will suffice if he remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct; or even if, entirely for- § 1269

¹ Meagoe v. Simmons, 3 C. & P. 75.

² See now 28 & 29 V., c. 18, § 6, cited post, § 1437.

³ Alcock v. The Roy. Exch. Ins. Co., 13 Q. B. 292; Payne v. Ibbotson, 27 L. J., Ex. 341.

⁴ Maugham v. Hubbard, 8 B. & C. 14; Jacob v. Lindsay, 1 East. 459; Rambert v. Cohen, 4 Esp. 213, per Ld. Ellenborough; Catt v. Howard, 3 Stark. R. 3, per Abbott, C. J.

⁵ R. v. O'Connell, Arm. & T. 165—167.

⁶ Catt v. Howard, 3 Stark. R. 3, per Abbott, C. J.; Vaughan v. Martin, 1 Esp. 440, per Ld. Kenyon.

getting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question. Thus, where an agent, who had made a parol lease, and entered a memorandum of the terms in a book, stated that he had no memory of the transaction but from the book, though on reading the entry he entertained no doubt that the fact really happened, it was held sufficient;¹ and a barrister, called to prove that a witness had materially varied his account since the last trial, has been allowed to refresh his memory by the notes on his brief, though he had no independent recollection of what took place on the former occasion.² Another example³ of this kind, is where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to swear positively that it has passed through his hands. So, where a witness, from seeing his own signature to the attestation of a deed, says that he is therefore sure that he saw the party execute it, this is sufficient proof of the execution, though he adds that he has no recollection of the fact.⁴

§ 1413. In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable,⁵ —and if the witness has no independent recollection of the fact, it is necessary,—that they should be produced at the trial,⁶ and that the *opposite counsel* should have an *opportunity of inspecting* them, in order that on cross- or re-examination, he may have the benefit of the witness's refreshing his memory by every part.⁷ § 1270

¹ R. v. St. Martin's, Leicester, 2 A. & E. 210. See, also, Haig v. Newton, 1 Const. R. 423; Sharpe v. Bingley, id. 343; Maugham v. Hubbard, 8 B. & C. 14.

² R. v. Guinea, Ir. Cir. R. 167, per Crampton, J.

³ Gr. Ev. § 437, in great part, for seven lines.

⁴ Maugham v. Hubbard, 8 B. & C. 16, per Bayley, J.; R. v. St. Martin's, Leicester, 2 A. & E. 213, per Taunton, J.; Russell v. Coffin, 8 Pick. 143, 150; Jackson v. Christman, 4 Wend. 277, 282; Pigott v. Halloway, 1 Binn. 436; Smith v. Lane, 12 Serg. & R. 84, per Gibson, J.; Clark v. Vorce, 15 Wend. 193.

⁵ R. v. Hardy, 24 How. St. Tr. 824, per Eyre, C. J.

⁶ Beech v. Jones, 5 Com. B. 696.

⁷ Howard v. Canfield, 5 Dowl. 417, per Coleridge, J.; R. v. St. Martin's, Leicester, 2 A. & E. 215, per Patteson, J.; Sinclair v. Stevenson, 1 C. & P. 583, per Best, C. J.; Loyd v. Freshfield, 2 C. & P. 332; Dupuy v. Truman, 2 Y. & C., Ch. R. 341; Lord v. Colvin, 2 Drew. 205.

Neither is the adverse party bound to put in the document as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to;¹ but if he goes further than this, and asks questions as to other parts of the memorandum, it seems that he thereby makes it his own evidence.² If a paper be put into the hand of a witness, merely to prove handwriting, and not to refresh his memory,³ or if, being given to the witness for the purpose of

¹ *R. v. Ramsden*, 2 C. & P. 604, per *Ld. Tenterden*; *Gregory v. Tavernor*, 6 C. & P. 281, per *Gurney, B.*; *Payne v. Ibbotson*, 27 L. J., Ex. 341.

² *Gregory v. Tavernor*, 6 C. & P. 281. See *Stephens v. Foster*, 6 C. & P. 289.

³ *Russell Rider*, 6 C. & P. 416; *Sinclair v. Stevenson*, 1 C. & P. 583; *Lord v. Colvin*, 2 Drew. 205, per *Kindersley, V.-C.*; *S. C.*, before the *Lds. Just.*, 5 De Gex, M. & G. 47; 23 L. J., Ch. 469, *S. C.* In Scotland the subject of the use and proper office of writings, in restoring the recollection of witnesses, is stated with precision by *Mr. Allison*, in his able and philosophical *Treatise on the Practice of the Criminal Law*. "It is frequently made a question," he observes, "whether a witness may refer to notes or memoranda made to assist his memory. On this subject, the rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow a witness to look to memoranda made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony, or even to read such notes to the jury as his evidence, he having first sworn that they were made at the time and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when they were lost. With the exception, however, of such memoranda, notes, or inventories, made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence and *vivâ voce* examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of

refreshing his memory, the questions founded upon it utterly fail, the opposite party is not entitled to see it.¹ If he does look at it under these circumstances, he may be required by his adversary to put it in evidence.²

§ 1414. Unless evidence of reputation be admissible,³ witnesses § 1271 must, in general, merely speak to *facts* within their own knowledge; and they will not be permitted,—excepting under the circumstances that will presently be mentioned,⁴—to express their own *belief* or *opinion*. For instance, where goods had been supplied to a firm, and the question raised between the parties was, whether the defendant had held himself out to the plaintiff as the only person composing the firm, a witness, who proved the giving of the order by the defendant, was not allowed to be asked

this exception is founded in the consideration, that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subject to a further examination by the prosecutor, or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the panel, or the like, *utitur jure communi*. he stands in the situation of an ordinary witness, and must give his evidence verbally in answer to the questions put to him, and can only refer to jottings or memoranda of dates, &c., made up at the time to refresh his memory, like any other person put into the box." Pp. 540—542.

¹ *R. v. Duncombe*, 8 C. & P. 369, per Ld. Denman; *Lord v. Colvin*, 2 Drew. 205; *S. C.* before the Lds. Just., 23 L. J., Ch. 469; 5 De Gex, M. & G. 47, S. C. In *Holland v. Reeves*, 7 C. & P. 39, a party put a document into the hands of an adverse witness, and cross-examined him upon it, whereupon he was required by the opposite counsel to have it read forthwith; but Alderson, B., held that the cross-examining party was not bound to put in the document, until he had opened his own case. It would seem, however, in such a case, that the opposite counsel would have a right to inspect the document, in order to found questions upon it in re-examination. See post, §§ 1446—1452.

² *Palmer v. Maclear*, 1 Swab. & Trist. 149.

³ Ante, § 607.

⁴ Post, §§ 1416—1425.

with whom he dealt, because such a question was only a skilful mode of ascertaining the witness's opinion, which might be founded on hearsay evidence; and the court held, that the only proper inquiry was as to the acts done.¹ So, in an action of slander, if the words used are alleged to have been spoken in a sense different from their ordinary meaning, a by-stander cannot be asked, in the first instance, what he understood by them,² but the proper course will be to ask the witness whether there was anything to prevent the words from conveying the meaning which they ordinarily would convey to him; and then, if he states any facts which lead to the inference that they were used in a peculiar sense, a foundation will have been laid for the question, "What did you understand by those words?"³

§ 1415.⁴ But, though a witness, in general, must depose to such facts only as are *within his own knowledge*,⁵ the law does not require him to speak with such expression of *certainly* as to exclude all doubt. For, whatever may be the nature of the subject, if the witness has any personal recollection of the fact under investigation, he may state what he remembers concerning it, and leave the jury to judge of the weight of his testimony.⁶ But if the impression on his mind be so slight as to justify the belief that it may have been derived from others, or may be some unwarrantable deduction of his own dull understanding or lively imagination, it will be rejected.⁷ § 1272

§ 1416.⁸ On some particular subjects, positive and direct testimony may often be unattainable; and, in such cases, a witness is allowed to testify as to his *belief* or *opinion*, or even to draw § 1273

¹ Bonfield v. Smith, 12 M. & W. 405.

² D. of Brunswick v. Harmer, 3 C. & Kir. 10.

³ Daines v. Hartley, 3 Ex. R. 200. See Simmons v. Mitchell, 50 L. J., P. C. 11.

⁴ Gr. Ev. § 440, in part.

⁵ As to evidence of reputation, see ante, § 607.

⁶ Miller's case, 3 Wils. 427, per De Grey, C. J.; 2 W. Bl. 886, S. C.; Carmalt v. Post, 8 Watts, 411, per Gibson, C. J.; R. v. Stafford, 7 How. St. Tr. 1378, per Ld. H. St. Finch.

⁷ Clark v. Bigelow, 4 Shepl. 246.

⁸ Gr. Ev. § 440, in part.

inferences respecting the fact in question from other facts, provided these last facts be within his personal knowledge. Nor is this course fraught with much danger; because a witness who testifies falsely as to his *belief*, is equally liable to be convicted of perjury, with the man who swears positively to a fact which he knows to be untrue.¹ The only difference is, that proof of the commission of the crime is more difficult in the one case than in the other. In conformity with this rule, which admits evidence of opinion on the ground of necessity, witnesses are constantly permitted to express their belief respecting the *identity* of persons and things, as also respecting the genuineness of disputed *handwriting*.² So, where the question was whether a house agent was entitled to his commission, as on the sale of a house through his intervention, the purchaser was allowed to be asked whether he thought he should have bought the property if he had not obtained a card to view it from the agent's office.³ So, in a petition for damages on the ground of adultery,⁴ or in an action for breach of promise of marriage, any person who has been in a position to observe the mutual deportment of the parties, may give in evidence his opinion upon the question, whether or not they were attached to each other.⁵ In America it has been determined, upon grave consideration, and in conformity with the doctrine which has always prevailed in our ecclesiastical courts,⁶ that where a witness has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, he may depose, not only to particular facts, but to his opinion or belief as to the sanity of the party, formed from such actual observation.⁷ So, also, in that country,

¹ *R. v. Pedley*, 1 Lea. 327, per Ld. Mansfield; *Miller's case*, 2 W. Bl. 885, 886, per De Grey, C. J.; 3 Wils. 420, S. C.; *Folkes v. Chadd*, 3 Doug. 159, per Ld. Mansfield; *R. v. Schlesinger*, 10 Q. B. 670.

² As to proof of handwriting, see post, § 1862, et seq.; *Folkes v. Chadd*, 3 Doug. 159, per Ld. Mansfield.

³ *Mansell v. Clements*, 9 Law Rep., C. P. 139.

⁴ See 20 & 21 V., c. 85, § 33.

⁵ *Trelawney v. Colman*, 2 Stark. R. 192, per Holroyd, J.; *M'Kee v. Nelson*, 4 Cowen, 355.

⁶ *Wheeler v. Alderson*, 3 Hagg. Ec. R. 574, 604, 605.

⁷ *Clary v. Clary*, 2 Iredell, 78.

the subscribing witnesses to a will may testify their opinions, with respect to the sanity of the testator at the time of executing the will; for the law has placed them about the testator, to ascertain and judge of his capacity.¹

§ 1417.² This lax mode of examination, however, chiefly pre- 1274
 vails on questions of *science* or trade, where, from the difficulty, and occasional impossibility, of obtaining more direct and positive evidence, persons of skill, sometimes called *experts*, are allowed, not only to testify to facts, but to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted, as to the cause of disease or death, or the consequences of wounds, or the treatment of sickness; and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill.³ So, inspectors of franks, and other persons who have made the peculiarities of handwriting their special study, have been examined to their belief, as to whether the writing of an instrument was in a feigned hand, and also as to whether two documents, supposed to have been written in a disguised hand, were written by the same person.⁴ So, antiquaries have been called to fix, by conjecture, the date of ancient handwriting;⁵ and practical surveyors may express their opinions, whether certain marks on trees, piles of stone, &c., were intended as monuments of boundaries.⁶ So, an accountant, who, although not an actuary, was acquainted with the business of life insurance, has been allowed to give evidence as to the average and probable duration of lives, and the value of annuities.⁷ So, a secretary of a fire insurance company, accustomed to examine buildings with reference to the insurance of them, and who, as a county commissioner, had

¹ Chase v. Lincoln, 3 Mass. 237; Poole v. Richardson, id. 330; Rambler v. Tyron, 7 Serg. & R. 90, 92; Buckminster v. Perry, 4 Mass. 590; Grant v. Thompson, 4 Conn. 203; Wogan v. Small, 11 Serg. & R. 141.

² Gr. Ev. § 440, in part.

³ 1 St. Ev. 175; Tait, Ev. 433; R. v. Wright, R. & R. 456; Hathorn v. King, 8 Mass. 371; Collett v. Collett, 1 Curt. 687.

⁴ Goodtitle v. Braham, 4, T. R. 497.

⁵ Tracy Peer, 10 Cl. & Fin. 191.

⁶ Davis v. Mason, 4 Pick. 156.

⁷ Rowley v. Lond. & N. W. Ry. Co., 42 L. J., Ex. 153 per Ex. Ch.; 8 Law Rep., Ex. 221, S. C.

frequently estimated damages occasioned by the laying out of rail-roads and highways, has been held competent to testify his opinion, as to the effect of laying a railroad within a certain distance of a building, upon the value of the rent, and the increase of the rate of insurance against fire.¹ So, where the question was, whether a paper had contained certain pencil-marks, which were alleged to have been rubbed out, the opinion of an engraver, who had examined the paper with a mirror, was held to be admissible evidence, *valeat quantum*.² Seal-engravers, also, may be called to give their opinions upon an impression, whether it was made from an original seal, or from another impression.³ So, the opinion of an artist in painting is evidence respecting the genuineness of a picture.⁴ And it seems, that a postmark may be proved by the opinion of a clerk of the post-office, or, perhaps, of any one, who has been in the habit of receiving letters with that mark.⁵

§ 1418.⁶ Where the question was whether a bank, which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific engineers, as to the effect of such embankment upon the harbour, were held to be admissible evidence.⁷ So, naturalists, who have observed the habits of certain fish, have been permitted to state their opinions, as to the ability of the fish to overcome particular obstructions in the rivers which they are accustomed to ascend.⁸ So, in the case of *Bradley v. Arthur*,⁹ the opinion of experienced officers was

¹ *Webber v. East Ry. Co.*, 2 Mete. 147. Where a point, involving questions of practical science, is in dispute before a court unaided by a jury or assessors, the court will advise a reference to an expert in that science for his opinion on the facts; and the report of such party will be adopted by the court. *Webb v. Manch. & Leeds Ry. Co.*, 4 Myl. & Cr. 120, 121; 1 Rail. Cas. 576, S. C.

² *R. v. Williams*, 8 C. & P. 434, per Parke, B., and Tindal, C. J.

³ *Per Ld. Mansfield*, in *Folkes v. Chadd*, 3 Doug. 157.

⁴ In *Belt v. Lawes*, tried by Huddleston, B., in 1883, many R. A.'s were called who expressed decided opinions hostile to the plaintiff's artistic claims; but the jury,—influenced possibly by the comments of the judge,—disregarded this testimony. M. S.

⁵ *Abbey v. Lill*, 5 Bing. 299, 304, per Gaselee, J.; *Fletcher v. Braddyll*, 3 Stark. R. 64; *Woodcock v. Houldsworth*, 16 M. & W. 124.

⁶ *Gr. Ev.* § 440, in part.

⁷ *Folkes v. Chadd*, 3 Doug. 157.

⁸ *Cottrill v. Myrick*, 3 Fairf. 222.

⁹ 4 B. & C. 295, 305, 307, 311. See, also, *Barwis v. Keppel*, 2 Wils. 314. (4080)

taken respecting a question of military practice, and the court held that such evidence was clearly admissible, though the Lord Chief Justice was unwilling to attach to it any great weight. In short, it may be laid down as a general rule, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance;¹ in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature.²

§ 1419. On the other hand, it seems equally clear, that the § 1276
opinions of skilled witnesses cannot be received, when the inquiry relates to a subject, which does not require any peculiar habits or course of study in order to qualify a man to understand it.³ Therefore⁴ witnesses are not permitted to state *their views on matters of moral or legal obligation*, or on the manner in which other persons would *probably have been influenced*, had the parties acted in one way rather than another.⁵ Thus, the opinions of medical practitioners upon the question, whether a certain physician had honourably and faithfully discharged his duty to his medical brethren, have been rejected; because, on such a point, the jury were as capable of forming an opinion as the witnesses themselves.⁶

§ 1420. In some cases, it may be difficult to determine whether § 1277
the particular question be one of a scientific nature or not, and, consequently, whether skilled witnesses may or may not pass their opinions upon it. Thus, if an action be brought on a policy of insurance, and the question be, whether facts withheld from the underwriter were material, can persons conversant with the business of insurance be asked their opinions on this subject? Or if the action be against the insurance broker for negligence, in not

¹ *M'Fadden v. Murdock*, I. R., 1 C. L. 211.

² 1 Smith, L. C. 491, note to *Carter v. Boehm*.

³ *Id.*

⁴ Gr. Ev. § 441, in part.

⁵ *Campbell v. Rickards*, 5 B. & Ad. 846, per Ld. Denman.

⁶ *Ramadge v. Ryan*, 9 Bing. 333.

drawing, or in not altering, a policy according to instructions, can other brokers be called to state their opinions as to what the conduct of persons similarly situated ought to have been? To these queries no satisfactory answer can be given, as the Court of Queen's Bench has said that such evidence cannot be received,¹ while the Court of Common Pleas has determined that it can.² In *Greville v. Chapman*,³ which was an action for a libel, imputing to the plaintiff dishonourable conduct in withdrawing a horse which had been entered for a race, and against which he had betted, a witness for the plaintiff on cross-examination stated, that by the rules of the Jockey Club a man might bet against his own horse, and then withdraw him without assigning any reason, and that, in such a case, he would be entitled to receive the amount of the wager. On re-examination, he was asked his opinion respecting the morality of such conduct, and the court held that this question might properly be put with the view of arriving at the real meaning of the rules.

§ 1421. The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case as proved by other witnesses* at the trial.⁴ But here the witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine. For instance, if the question be whether a particular act, for which a prisoner is tried, were an act of insanity, a medical man, conversant with that disease, who knows nothing

¹ *Campbell v. Rickards*, 5 B. & Ad. 480; 2 N. & M. 542, S. C.; relying on *Carter v. Boehm*, 3 Burr. 905, 913, 914; and *Durrell v. Bederley*, Holt, N. P. R. 283, per Gibbs, J. See, also, *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, 79.

² *Chapman v. Walton*, 10 Bing. 57; 3 M. & Sc. 389, S. C.; relying on *Rickards v. Murdock*, 10 B. & C. 527; and *Berthon v. Loughman*, 2 Stark. R. 258, per Holroyd, J. See, further, 1 Smith, L. C. 486—492; *Lindenau v. Desborough*, 8 B. & C. 586.

³ 5 Q. B. 731. It is not probable that the courts would sanction any extension of the doctrine here propounded.

⁴ *R. v. Wright*, R. & R. 456; *R. v. Searle*, 1 M. & Rob. 75, per Park, J.; *Fenwick v. Bell*, 1 C. & Kir. 312; *Beckwith v. Sydebotham*, 1 Camp. 117; *Collett v. Collett*, 1 Curt. 687

of the prisoner, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts.¹ Where, indeed, the facts are admitted, or not disputed, and the question thus becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though it cannot be insisted on as a matter of right.² An objection, too, is the less likely to be taken to this course under ordinary circumstances, as no practical benefit would result from taking it; for the counsel examining may always attain his object by putting the question hypothetically; that is, by desiring the witness first to assume such and such facts to be true, and then to state his opinion as to the prisoner's state of mind.³ So, in an action for unskilfully navigating a ship, though a Master of the Trinity House, or other nautical witness, cannot in strictness be asked whether, after having heard the evidence, he thinks the ship was properly or improperly navigated;—for, in answering such a question, the witness would have to draw a conclusion of fact, as well as to give his opinion upon it;⁴—yet he may be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true.⁵ So, upon a question of seaworthiness, experienced shipwrights have frequently been called to give an opinion as to whether a ship in a state in which the one in question was sworn to be on a certain day of the voyage, could have been seaworthy when the policy was effected.⁶

¹ *M'Naghten's case*, 10 Cl. & Fin. 200, 211, 212; 1 C. & Kir. 135, 136; 8 Scott, N. R. 595, L. C.

² *Id.*

³ *R. v. Wright*, R. & R. 456.

⁴ *Sills v. Brown*, 5 C. & P. 604, 605, per Coleridge, J. See, also, *Jameson v. Drinkald*, 12 Moore, 148.

⁵ *Fenwick v. Bell*, 1 C. & Cir. 312, per Coltman, J.; *Malton v. Nesbit*, 1 C. & P. 72, per Abbott, C. J. In appeals under the Shipping Casualties Investigations Act, 1879, 42 & 43 V., c. 72, § 2, the Court of Appeal, being advised by nautical assessors, will not permit experts to be called to give evidence on questions of nautical knowledge or skill. *The Kestrel*, L. R., 6 P. D. 182.

⁶ *Beckwith v. Sydebotham*, 1 Camp. 116, 117, per Ld. Ellenborough; *Thornton v. Roy. Ex. Ass. Co.*, Pea. R. 25, per Ld. Kenyon.

§ 1422. It would seem, that in all cases where skilled witnesses § 1279 are called to pronounce their opinions on some scientific question, they may refresh their memory by referring to professional treatises,¹ tables, calculations, lists of prices and the like. For instance, an actuary might refer to "the Carlisle Tables," when called upon to give evidence respecting the value of an annuity on joint lives;² and an architect might, it is presumed, refresh his memory with any price list of generally acknowledged correctness. So, although medical books are not directly admissible in evidence,³ no good reason can be given, why a physician should not be allowed to strengthen his recollection by referring to such as he considers to be works of authority; or why he should not be asked, after such a reference, whether his judgment was or was not thereby confirmed. It does not, however, appear, that this course has ever been directly sanctioned; though a medical witness has been asked whether, in the course of his reading, he has not found a certain mode of treatment prescribed; and he has also been permitted, while explaining the grounds of his opinion, to state that his judgment was founded in part on the writings of his professional brethren.⁴

§ 1423. In conformity with the general rule which admits in § 1280 evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of *the laws*, as well written as unwritten, and of the usages and customs of *Foreign States*, may, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject.⁵ Thus, in the great case of *Dalrymple v. Dalrymple*,⁶ where the point for the decision of the court turned on the state of the Scotch Marriage Law, the depositions of eminent Scottish lawyers were given in evidence, and carefully sifted and

¹ See post, § 1423, ad fin. The Ind. Ev. Act, 1872, § 159, is as follows:—"An expert may refresh his memory by reference to professional treatises."

² *Rowley v. Lond. & N. W. Ry. Co.*, 42 L. J., Ex. 153, per Ex. Ch.; 8 Law Rep., Ex. 221, S. C.

³ *Collier v. Simpson*, 5 C. & P. 74, per Tindal, C. J.

⁴ *Id.*, 73, per *id.*

⁵ See ante, §§ 5, 9, 48.

⁶ 2 Hagg. Cons. 54. See, also, *R. v. Povey*, 22 L. J., M. C. 19; *Pearce & D.* 32; 6 Cox, 83, S. C.

compared by Sir William Scott in his admirable judgment. It seems to have been thought at one time, that all foreign *written* law must be proved by a copy properly authenticated;¹ but this doctrine is now distinctly exploded;² the House of Lords having determined,³—in accordance with a decision of the Court of Queen's Bench,⁴—that whenever foreign written law is to be proved, that proof cannot be taken from the book of the law, but must be derived from some skilled witness who describes the law. For instance, if any question were to arise in a British court of justice respecting the existence or meaning of a French law, it would not suffice to produce the Code Napoléon, because the court would not have organs to deal with and construe its provisions; but the assistance of foreign lawyers, who knew how to interpret it, must of necessity be prayed in aid.⁵ Still, the witness may refresh and

¹ *R. v. Picton*, 30 How. St. Tr. 491, per Ld. Ellenborough; *Clegg v. Levy*, 3 Camp. 166, per *id.*; *Millar v. Heinrick*, 4 Camp. 155, per Gibbs, C. J.; *Free-moult v. Dedire*, 1 P. Wms. 431; *Boehtlinck v. Schneider*, 3 Esp. 58, per Ld. Kenyon.

² Ld. Brougham, in his able sketch of Ld. Stowell, thus explains the duty of a judge in dealing with questions of foreign law:—"It is possibly hypercritical to remark one inaccurate view which pervades a portion of this judgment [in *Dalrymple v. Dalrymple*]. Although the Scottish law was of course only matter of evidence before Sir W. Scott, and as such for the most part dealt with by him, he yet allowed himself to examine the writings of commentators, and to deal with them as if he were a Scottish lawyer. Now, strictly speaking, he could not look at those text-writers, nor even at the decisions of judges, except only so far as they had been referred to by the witnesses, the skilful persons, the Scottish lawyers, whose testimony alone he was entitled to consider. For *they* alone could deal with either dicta of text-writers or decisions of courts. *He* had no means of approaching such things, nor could avoid falling into errors when he endeavoured to understand their meaning, and still more when he attempted to weigh them and to compare them together. This at least is the strict view of the matter, and in many cases the fact would bear it out. Thus we constantly see gross errors committed by Scottish and French lawyers of eminence, when they think they can apply an English authority. But in the case to which we are referring, the learned judge certainly dealt as happily, and as safely, and as successfully, with the authorities, as with the conflicting testimonies which it was his more proper province to sift and to compare." Statesmen of the Time of G. 3, 2nd Ser. 76.

³ *Sussex Peer.*, 11 Cl. & Fin. 85, 114—117.

⁴ *Baron de Bode's case*, 8 Q. B. 208, 250—267.

⁵ *Sussex Peer.*, 11 Cl. & Fin. 115, per Ld. Brougham. See, also, *Ld. Nelson v. Ld. Bridport*, 8 Beav. 527, where this subject is very ably treated by Ld.

confirm his recollection of the law, or assist his own knowledge, by referring to text-books, decisions, statutes, codes, or other legal documents, or authorities; and if he describes these works as truly stating the law, they may be read, not as evidence per se, but as part and parcel of his testimony.¹

§ 1424. The principles which should govern our courts in the construction of foreign documents were much discussed in the case of the *Duchess di Sora v. Philipps*.² The question there turned on the meaning of a preliminary marriage contract which had been drawn up in the Italian language and executed at Rome; and the House of Lords held that, before the judge could discover and declare that meaning, he should obtain, through the medium of skilled witnesses, first, a translation of the document; secondly, an explanation of any terms of art used in it; and, thirdly, information on any special law, or on any peculiar rule of construction, of the foreign State affecting it. Aided by these lights, the court would then proceed to put a judicial construction upon the instrument. § 1280A

§ 1425. In order to render a witness competent to give evidence on a point of foreign law, he must either be a *professional man* belonging to the country whose laws are in question, or at least he must hold *some official situation*, which presumes, because it requires, sufficient knowledge.³ Thus, a judge, an advocate, a barrister, or a solicitor, will be an admissible witness to prove the laws of his own country; and an attorney-general, though not a barrister, as is occasionally the case in some of our colonies, may be examined as a person *peritus virtute officii*.⁴ So, a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, § 1281

Langdale, M. R. See, too, *Cocks v. Purday*, 2 C. & Kir. 269; and *Bremer v. Freeman*, 10 Moo., P. C. R. 306.

¹ *Sussex Peer.*, 11 Cl. & Fin. 114—117; *Ld. Nelson v. Ld. Bridport*, 8 Beav. 527.

² 2 New R. 553; 10 H. of L. Cas. 624; 33 L. J., Ch. 129, S. C. See *The Stearine, &c., Co., v. Heintzmann*, 17 Com. B., N. S. 60.

³ *Sussex Peer.*, 11 Cl. & Fin. 134.

⁴ *Id.* 124, per Ld. Brougham; *R. v. Picton*, 40 How. St. Tr. 509—512; *Ward v. Dey*, 7 Ec. & Mar. Cas. 96, 101—106.

has, in virtue of that office, been considered as a person skilled in the matrimonial law of Rome, and therefore an admissible witness to prove that law.¹ But on an indictment for bigamy, where the first marriage ceremony had been performed in Scotland by a Roman Catholic priest, such priest was not allowed to give evidence respecting the Scottish law of marriage.² Whether a French *vice-consul* here would be allowed to prove the law of France as a person officially skilled, may admit of some doubt, though on one occasion the testimony of such a person was admitted by Lord Tenterden,³ and on another occasion the Probate Division of the High Court has allowed Persian law to be proved by a Persian ambassador.⁴ Be this as it may, the law of a foreign country cannot be proved even by a jurisconsult, if his knowledge of it be derived solely from his having studied it at a university in another country.⁵ Neither, as it seems, can a merchant or other person, who holds no official situation, and who is unconnected with the legal profession, be heard to expound the law, though the judge may be satisfied that he really possesses ample knowledge on the subject.⁶ If the question, however, relates to a foreign *custom* or *usage*, any witness will be admissible who is acquainted with the fact;⁷ and, therefore, a London hotel-keeper, who was formerly a merchant and stockbroker at Brussels, has been permitted to prove the mercantile usage in Belgium, with respect to the presentment of a promissory note that was made payable in a particular place.⁸

§ 1426. The question how far a party is at liberty to discredit § 1232

¹ *Sussex Peer.*, 11 Cl. & Fin. 84, 117—124.

² *R. v. Savage*, 13 Cox, 178, per Lush, J.

³ *Lacon v. Higgins*, 3 Stark. R. 178; D. & R., N. P. C. 38, S. C.

⁴ *Dost Aly Khan*, in goods of, L. R., 6 P. D. 6.

⁵ *Bristow v. Sequeville*, 5 Ex. R. 275; 3 C. & Kir. 64, S. C., nom. *Bristow v. De Sequeville*: *Bonelli*, re, L. R., 1 P. D. 69; 45 L. J., P. D. & A. 42, S. C.

⁶ Per Ld. Lyndhurst, C., stating the unanimous opinion of the judges and the Lords, in *Sussex Peer.*, 11 Cl. & Fin. 134, and overruling *R. v. Dent*, 1 C. & Kir. 97.

⁷ *Ganer v. Lanesborough*, 1 Pea. R. 18; explained by Ld. Lyndhurst, C., in *Sussex Peer.*, 11 Cl. & Fin. 124. See *Mostyn v. Fabrigas*, 1 Cowp. 174, per Ld. Mansfield; *Feaübert v. Turst*, Prec. Ch. 207.

⁸ *Vander Donckt v. Thellusson*, 8 Com. B. 812.

his own witness, is one which for years was agitated in Westminster Hall,¹ and which at length was settled by the Legislature. The Common Law Procedure Act, 1854,² contains, in § 22, the following salutary, though ill-drawn,³ enactment on this subject:—"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse,"—that is, 'hostile,' as contra-distinguished from being merely 'unfavourable,'⁴—"contradict him by other evidence, or, *by leave of the judge*,⁵ prove that he has made at other times a statement inconsistent with his present testimony;⁶ but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."⁷

¹ See 1st Ed. of this Work, §§ 1044—1049.

² 17 & 18 V., c. 125.

³ *Greenough v. Eccles*, 28 L. J., C. P. 164, per Cockburn, C. J.; 5 Com. B., N. S. 806, S. C.

⁴ *Greenough v. Eccles*, 5 Com. B., N. S. 786; 28 L. J., C. P. 160, S. C., per Williams and Willes Js.: dubit. Cockburn, C. J. In *Dear v. Knight*, 1 Fost. & Fin. 433, Erle, J., appears to have regarded a witness as "adverse," simply because he made a statement contrary to what he was called to prove. See, also, *Pound v. Wilson*, 4 Fost. & Fin. 301, per id.

⁵ See *Faulkner v. Brine*, 1 Fost. & Fin. 254.

⁶ See *Reed v. King*, 30 Law Times, 290, Ex.; *Jackson v. Thomason*, 31 L. J., Q. B. 11; 1 B. & S. 745, S. C.; *Coles v. Coles and Brown*, 35 L. J., Pr. & Mat. 40; 1 Law Rep., P. & D. 70, S. C. See, also, *Ryberg v. Ryberg*, 32 L. J., Pr. & Mat. 112, where Sir C. Cresswell and the counsel on both sides appear to have ignored the existence of the enactment under discussion.

⁷ This enactment is borrowed in great part from §§ 1845, 1848, of the N. York Civ. Code, under which sections, "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present; and he must be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them." The Scotch law on this subject is defined by the Act of 15 & 16 V., c. 27, which in § 3 enacts, that "it shall be competent to examine any witness who may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue, different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or pro-

§ 1427. This enactment has been extended, by subsequent § 1283
piecemeal legislation,¹ "to all courts of judicature, as well criminal²
as all others, and to all persons having, by law, or by consent of
parties, authority to hear, receive, and examine evidence," whether
in England or in Ireland. It therefore applies to all the Divisions
of the High Court in either country, and to examinations conducted
by an examiner of those courts respectively. Since the examiner,
however, has no power to determine questions as to the relevancy or
adverse nature of the evidence of a witness, or, in other respects, to
act as a judge, he cannot himself give leave under the Act to pro-
duce counter evidence; but a special application for that purpose
must be made to the court.³ When an examiner has reason to
believe that a party will seek to avail himself of the statutory power
of discrediting his own witness, he should take down the particular
questions, as well as the answers upon which counter evidence may
be required.⁴

§ 1428. When a witness has been called by one party, the § 1285
other party, as soon as the examination in chief is closed, has a
right to *cross-examine* him. The exercise of this right is justly
regarded as one of the most efficacious tests, which the law has
devised for the discovery of truth. By means of it, the situation
of the witness with respect to the parties and to the subject of
litigation, his interest, his motives, his inclination and prejudices,
his character, his means of obtaining a correct and certain know-
ledge of the facts to which he bears testimony, the manner in
which he has used those means, his powers of discernment,
memory, and description, are all fully investigated and ascertained,
and submitted to the consideration of the jury, who have an oppor-
tunity of observing his demeanor, and of determining the just value
of his testimony. It is not easy for a witness, subjected to this test,
to impose on a court or jury; for, however artful the fabrication of

ceeding to adduce evidence, to prove that such witness has made such different
statement on the occasion specified."

¹ 17 & 18 V., c. 125, § 103; 19 & 20 V., c. 102, §§ 25, 98, Ir.; 28 & 29 V.,
c. 18, §§ 1, 3.

² See *R. v. Little*, 15 Cox, 319.

³ *Buckley v. Cooke*, 1 Kay & J. 29, per Wood, V.-C.

⁴ *Id.*

falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be extended.¹

¹ St. Ev. 186. On the subject of examining and cross-examining witnesses *vivâ voce*, Quintilian gives the following instructions:—"Primum est, nōsse testem. Nam timidus terrieri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest: prudens vero et constans, vel tanquam inimicus et perversus, dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiam criminum destruendus. Probos quosdam et verecundos non asperere incessere profuit; nam sæpe, qui adversus insectantem pugnassent, modestiâ mitigantur. Omnis autem interrogatio, *aut in causâ est, aut extra causam.* In causâ (sicut accusatori præcepimus,) patronus quoque altius, unde nihil suspectis, repetitâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur; et naturali magis acumine, aut usu contingit hæc virtus. * * *Extra causam* buoque multa, quæ prosint, rogari solent, de vitâ testium aliorum, de suâ quisque, si turpitude, si humilitas, si amicitia accusatoris, si inimicitie cum reo, in quibus aut dicant aliquid, quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis *interrogatio debet esse circumspecta*; quia multa contra patronos venuste testis sæpe respondet, eique præcipue vulgo favetur; tum verbis quam maxime ex medio sumptis; ut qui rogatur (is autem sapius imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est." Quintil. Inst. Orat. lib. 5, c. 7. Mr. Alison observes on the same subject,—“It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separatè questions; for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel. Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner, that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that, in the course of such rapid examination, facts most material to the cause are elicited, which were either denied, or but par-

§ 1429. Such being the importance which is properly attached to the right of cross-examination, it is not surprising that questions should occasionally arise, as to whether the witness has been so called by the one party as to entitle the other party to exercise this right. And here it is clear, that if the witness be called under a subpoena duces tecum, merely for the *purpose of producing a document*, which either requires no proof, or is to be identified by another witness, he need not be sworn, and if unsworn, he cannot be cross-examined.¹ So, if a witness be sworn under a mistake, whether on the part of counsel or of the officer of the court, and that mistake be discovered before the examination in chief has substantially begun, no cross-examination will be allowed.² Neither has the adverse party any right to cross-examine a witness, whose examination in chief has been tially admitted before. In such cases, there is no good ground, on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens, that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal." Alison, Pract. of Cr. L. 546, 547. See, also, Evans on Cross-exon. in his Append. to Poth. Obl., No. 16, Vol. 2, pp. 233, 234. Lord Bacon, in his Essay on Cunning, shrewdly observes,—“A sudden, bold, and unexpected question doth many times surprise a man, and lay him open. Like to him that, having changed his name, and walking in Paul's, another suddenly came behind him and called him by his true name, whereat straightways he looked back.” This “dodge” has been successfully practised on a deserter, who,—after solemnly asserting that he had never been a soldier,—betrayed his falsehood by obeying a sudden word of command to “stand at ease!” The late Ld. Abinger, whose powers as a cross-examining counsel were unrivalled, was fond of giving his juniors this advice,—“Never drive out two tacks by trying to hammer in a nail.” Had Sir J. Coleridge, Att.-Gen., remembered that axiom in the Tichborne cause, the criticisms on his cross-examination of the claimant would have been less severe, or at least less merited.

¹ Summers v. Moseley, 2 C. & M. 477; 4 Tyr. 158, S. C.; Perry v. Gibson, 1 A. & E. 48; 3 N. & M. 462, S. C.; Rush v. Smith, 1 C. M. & R. 94; Davis v. Dale, M. & M. 514; 4 C. & P. 335, S. C.; R. v. Murlis, M. & M. 515; Simpson v. Smith, 2 Ph. Ev. 397; Griffith v. Ricketts, 7 Hare, 300.

² Wood v. Mackinson, 2 M. & Rob. 273, per Coleridge, J.; Clifford v. Hunter, 3 C. & P. 16, per Ld. Tenterden; Rush v. Smith, 1 C. M. & R. 94; Reed v. James, 1 Stark. R. 132, per Ld. Ellenborough.

stopped by the judge, after his having answered a merely immaterial question.¹ But, on the other hand, it is by no means necessary that the witness should have been actually examined in chief; for if he has been intentionally called and sworn, and is moreover a competent witness, the opposite party has, in strictness, a right to cross-examine him, though the party calling him has declined to ask a single question.² Where witnesses are simply called to speak to the character of a prisoner, it is not usual to cross-examine them, excepting under special circumstances;³ but no rule of law expressly forbids this course. Where any person, whether he be a party to the proceedings or not, has made an affidavit, which has been filed for the purpose of being used before the court, he becomes liable to cross-examination, and he cannot be exempted from such liability by the subsequent withdrawal of the affidavit.⁴

§ 1430. In criminal cases, although the prosecutor is not *bound* § 1287 to call every witness whose name is indorsed on the indictment,⁵ he *usually* does so; and even if he declines to call any such witness, he should at least have him in court, so that he may be called for the defence, if wanted for that purpose.⁶ The judge, too, in his discretion, will sometimes call any witnesses that have been omitted, in order to give the prisoner's counsel an opportunity to cross-examine them.⁷ This rule applies to misdemeanors as well as to felonies,⁸ and includes every witness who has been sworn with the view of going before the grand jury, though he may not have been actually examined by that body.⁹ Indeed, in

¹ *Creedy v. Carr*, 7 C. & P. 64, per Gurney, B.

² *R. v. Brooke*, 2 Stark. R. 472, per Ld. Tenterden; *Phillips v. Eames*, 1 Esp. 357, per Ld. Kenyon; *Reed v. James*, 1 Stark. R. 132; *Wood v. Mackinson*, 2 M. & Rob. 275, 276. The same rule prevails in the Eccles. Courts; *Newton v. Ricketts*, 6 Ec. & Mar. Cas. 35.

³ *R. v. Hodgkiss*, 7 C. & P. 298, per Alderson, B.

⁴ *Re Quartz Hill Co.*, ex. p. Young, L. R., 21 Ch. D. 642, per Ct. of App.; 51 L. J., Ch. 910, S. C. Rules of Sup. Ct., 1883, Ord. XXXVIII., R. 28, cited ante, § 1396A.

⁵ *R. v. Woodhead*, 2 C. & Kir. 520, by all the judges; *R. v. Flatley*, Ir. Cir. R. 445, per Pennefather, B.

⁶ *R. v. Woodhead*, 2 C. & Kir. 520; *R. v. Cassidy*, 1 Fost. & Fin. 79.

⁷ *R. v. Simmonds*, 1 C. & P. 84, per Hullock, B.; *R. v. Whitbread*, id. n.; *R. v. Taylor*, id. n.; *R. v. Beezley*, 4 C. & P. 220; *R. v. Bull*, 9 C. & P. 22.

⁸ *R. v. Vincent*, 9 C. & P. 91, per Alderson, B.

⁹ *R. v. Bodle*, 6 C. & P. 186, per Gaselee, J., and Vaughan, B.

serious cases, the court will sometimes, for the furtherance of justice, direct persons to be called as witnesses, though their names do not appear on the back of the indictment, provided there is reason to believe that they are acquainted with the circumstances of the case, and are consequently capable of giving material evidence.¹ Where a witness is thus called at the instance of the prisoner, and no question is put to him on behalf of the prosecution, he becomes the prisoner's witness,² and the prisoner's counsel, though still permitted to put questions in the nature of a cross-examination, cannot call witnesses to contradict his statement.³ Neither, in such a case, can the counsel for the prosecution ask any question on re-examination, which does not arise out of the cross-examination;⁴ and, perhaps, if he has refused to call the witness, he will not be allowed to re-examine him at all.⁵ When two or more persons are tried on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them.⁶ The counsel, too, for the other prisoners are entitled in such a case to reply upon his evidence.⁷

§ 1431. With respect to the *mode* of conducting a cross-examination, it is admitted on all hands, that *leading questions may in general be asked*;⁸ but this does not mean that the counsel may go the length of putting the very words into the mouth of the

¹ R. v. Holden, 8 C. & P. 609, 610, per Patteson, J. See, also, R. v. Chapman, 8 C. & P. 558, and R. v. Orchard, id. 559, n.; R. v. Stroner, 1 C. & Kir. 650, per Pollock, C. B.

² R. v. Woodhead, 2 C. & Kir. 520.

³ R. v. Bodle, 6 C. & P. 187, per Gaselee, J.

⁴ R. v. Beezley, 4 C. & P. 220, per Littledale, J.

⁵ R. v. Harris, 7 C. & P. 581.

⁶ R. v. Burdett, Pearce & D. 431; 6 Cox, 458, S. C. So, in Lord v. Colvin, 3 Drew. 222, Kindersley, V.-C., after consulting all the equity judges, held that, before an examiner in chancery, one defendant might cross-examine another defendant's witness.

⁷ R. v. Burdett, Pearce & D. 431; 6 Cox, 458, S. C.

⁸ In Scotland leading questions used not to be allowed in the cross-examination, any more than in the examination in chief; Burnet, Cr. L., c. 18, p. 465; 24 How. St. Tr. 660, n. But the modern practice of the Scottish courts on this point is similar to our own; 2 Dickson, Ev. 988.

witness, which he is to echo back again ;¹ neither does it sanction the putting of a question, assuming that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.² The rule ought also to receive some further qualification, where the witness is evidently hostile to the party calling him; for although it appears in one case to have been laid down, that leading questions may always be put in cross-examination, whether a witness be unwilling or not,³ some restriction should surely be imposed, where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party, who originally called the witness, has brought the evil on his own head; for a fraudulent witness might purposely conceal his bias in favour of one party, and thus induce the other to call him; or he might be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, would be obviously unjust; though, no doubt, this special evil is now capable of being materially mitigated, whether at *Nisi Prius*,⁴ or in the criminal courts,⁵ by the rule which entitles the counsel, who opens the case on either side, to sum up the evidence, and to point out the unsatisfactory nature of any testimony thus procured. In America, the judge, in his discretion, may prohibit leading questions from being put to an adversary's witness, who shows a strong interest

¹ *R. v. Hardy*, 24 How. St. Tr. 659, 755.

² *Hill v. Coombe*, and *Handley v. Ward*, per Abbott, C. J., cited 1 St. Ev. 188, n. n.

³ *Parkin v. Moon*, 7 C. & P. 409, per Alderson, B.

⁴ See Rules of Sup. Ct., 1883, Ord. XXXVI., R. 36, which is as follows:—"Upon a trial with a jury, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore." The law in Ireland is somewhat similar; see 19 & 20 V., c. 102, § 21. See, also, *Hodges v. Ancrum*, 11 Ex. R. 214. This practice does not apply to the County Courts; *Dymoch v. Watkins*, L. R., 10 Q. B. D. 451.

⁵ 28 & 29 V., c. 18, s. 2.

or bias in favour of the cross-examining party, and needs only an intimation to say whatever is most favourable to his cause.¹

§ 1432. On one point connected with the subject of cross- § 1289
examination, the American practice differs widely from that which obtains in this country. Here, and in Ireland, the cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case;² and therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence.³ So far has this doctrine been carried, that, even where it was requisite that the substantial, though not the nominal, party in the cause should be called by his adversary, for the sake of formal proof only, it was held, that he was thereby made a witness for all purposes, and might be cross-examined as to the whole case.⁴ In America, however, the Supreme Court has determined that a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his direct examination; and that, if he wishes to examine him respecting other matters, he must do so by making him his own witness, and by calling him, as such, in the subsequent progress of the cause.⁵

¹ *Moody v. Rowell*, 17 Pick. 498.

² *May & Corp. of Berwick-on-Tweed v. Murray*, 19 L. J., Ch. 281, 286. So, by the Scotch statute law, it is now enacted, that "in any action, cause, prosecution, or other judicial proceeding, civil or criminal, where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party, against whom a witness is produced and sworn *in causâ*, to examine such witness, not in cross only, but *in causâ*," 3 & 4 V., c. 59, § 4.

³ But see *Re Woodfine*, 47 L. J., Ch. 832, where Fry, J., would not allow the defendant in an action for a legacy to cross-examine the plaintiff respecting an independent counterclaim, but directed him to recall the plaintiff as his own witness. *Sed qu.*

⁴ *Morgan v. Brydges*, 2 Stark. R. 314, per Abbott, J.; *R. v. Murphy*, 1 Arm. M. & O. 206, per Pennefather, C. J.

⁵ *Philadelphia & Trenton Ry. Co. v. Simpson*, 14 Pet. 448, 461. See, also, *Harrison v. Rowan*, 3 Wash. 580; *Ellmaker v. Buckley*, 16 Serg. & R. 77; *Contrâ*, *Moody v. Rowell*, 17 Pick. 490, 498.

§ 1433.¹ Whether, when a person is once entitled to cross-examine a witness, *this right continues through all the subsequent stages of the cause*, so that if he afterwards recalls the same witness to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been entertained. The general principle on which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and it seems that, in common fairness, each party should alternately have the right of cross-examining such a witness as to his adversary's case, while both should be precluded, in the course of the respective examinations in chief, from putting leading questions with regard to their own.² Accordingly, it has been held in Ireland, that a plaintiff may cross-examine any of his own witnesses, on their being afterwards called on behalf of the defendant.³ In one English case,⁴ however, Lord Kenyon is reported to have ruled, that a plaintiff's witness, who was recalled by the defendant to establish a plea of tender, might, in such examination in chief, have leading questions put to him as in an ordinary cross-examination; but the soundness of this decision, if cited in support of a general rule, may be doubted.

§ 1434.⁵ The rule which confines evidence to the points in issue, and excludes all proof of such collateral facts as afford no reasonable inference with respect to the principal matters in dispute,⁶ is not usually applied in cross-examinations with the same strictness as in examinations in chief; but great latitude of interrogation is sometimes permitted, when, from the temper or conduct of the witness, or from other circumstances, such course seems essential to the discovery of truth; or where the cross-examiner will under-

¹ Gr. Ev. § 447, as to first nine lines.

² 1 St. Ev. 187; 2 Ph. Ev. 401.

³ *Malone v. Spillissy*, Ir. Cir. R. 504, per Lefroy, B. See, too, *Lord v. Colvin*, 3 Drew. 222, where S. P. ruled by Kindersley, V.-C.

⁴ *Dickinson v. Shee*, 4 Esp. 67.

⁵ Gr. Ev. § 449, in part.

⁶ Ante, § 316, et seq.

take to show, at some subsequent stage of the trial, by other evidence, the relevancy of the question put.¹ On this head it is difficult to lay down, or rather to apply, any precise general rule.² Still, one or two subsidiary rules have been clearly established, and a due attention to these will enable the practitioner to define with tolerable certainty the limits, within which questions on cross-examination must be confined.

§ 1434A. First, by virtue of the Rules of the Supreme Court, 1883, Order XXXVI., R. 38, a “judge may now in all cases disallow any questions put in cross-examination of any party or other witness, which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.”

§ 1435. Next, no question respecting any fact *irrelevant to the issue* can be put to a witness on cross-examination, for the mere purpose of *impeaching his credit by contradicting him*; and if any such question be inadvertently put and answered, the *answer* of the witness will be *conclusive*.³ For instance, it was held prior to the repeal of the usury laws,⁴ that in a penal action for usury, alleged to have been committed in a contract made by the defendant with a witness who was called to establish the offence, the defendant’s counsel could not cross examine this witness as to other contracts made by him with other persons about the same time, in order to draw an inference that the contracts were all of the same nature, if the witness stated that the latter were not usurious, and to contradict him by extrinsic proof, if he said that they were.⁵ Again, on the trial of an issue, whether the defendant’s manufactory emitted smoke prejudicial to the plaintiff’s garden, where both parties had examined witnesses as to the effect of the works on neighbouring grounds, a witness was called by the defendant, who described several gardens in the neighbourhood as uninjured. In cross-examination, he was asked whether he knew

¹ Haigh v. Belcher, 7 C. & P. 389, per Coleridge, J.

² Lawrence v. Baker, 5 Wend. 305.

³ See Baker v. Baker, 32 L. J., Pr. & Mat. 145; 3 Swab. & Trist. 213, S. C.

⁴ By 17 & 18 V., c. 90.

⁵ Spenceley v. De Willott, 7 East, 108.

Glasgow field, and having answered that he did, but that "he never knew of any damage done there," the counsel for the plaintiff proposed to ask him, "Whether he had known of any sum having been paid by the defendant to the proprietors of Glasgow field, for alleged damage occasioned by the works?" The learned judge, however, refused to allow this question to be put, and on a bill of exceptions, the House of Lords confirmed the ruling.¹ Here, had the answer been in the affirmative, it would not have been evidence, because money paid to quiet a complaint can be no proof that the demand was well founded; and even if it were evidence in favour of the party receiving the money, it could not be evidence on behalf of a stranger. Neither was the question admissible in order to test the credit of the witness; for, raising, as it did, an irrelevant inquiry, the answer could not have been contradicted, had it been in the negative.

§ 1436. Thirdly, with the view of *impeaching* the *character* of a witness, he may always be asked on cross-examination,²—though, as will be presently seen, he is not always compelled to answer,³—questions with regard to alleged *crimes* or other improper conduct on his part; and here, if the fact inquired into be relevant to the issue, it may be proved by other evidence although denied by the witness; but if it be irrelevant, the answer of the witness, when he makes any, must be regarded as conclusive; and whether he answers or not, no independent proof can be given to establish the truth of the imputation.⁴ § 1293

§ 1434. An exception⁵ to this last rule has been recognised by § 1294

¹ *Tennant v. Hamilton*, 7 Cl. & Fin. 122.

² *Harris v. Tippet*, 2 Camp. 638, per Lawrence, J.; *R. v. Yewin*, id. 639, per id.; *R. v. Edwards*, 4 T. R. 440; *R. v. Barnard* and *R. v. James*, cited in n., 1 C. & P. 86, 87; *R. v. Watson*, 2 Stark. R. 149; 32 How. St. Tr. 292, et seq., S. C. The cases of *R. v. Lewis*, 4 Esp. 225; *Macbride v. Macbride*, id. 242; and *R. v. Pitcher*, 1 C. & P. 85, where questions tending to degrade the witness were not allowed to be put, cannot now be regarded as authorities.

³ Post, § 1453, et seq.

⁴ *R. v. Watson*, 2 Stark. R. 149; 32 How. St. Tr. 486—495, S. C.; *R. v. Rudge*, Pea. Add. Cas. 232, per Lawrence, J.; *Goddard v. Parr*, 24 L. J., Ch. 783, per Kindersley, V.-C.

⁵ See the reasons for this exception as stated by the Com. Law Commiss., in their 2nd Rep. pp. 21, 22.

the Legislature, and the Act of 28 & 29 V., c. 18, enacts, in § 6, that "a witness may be questioned as to whether he has been *convicted* of any *felony* or *misdemeanor*, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction;" and this too, although the fact of such conviction be altogether irrelevant to the matter in issue in the cause.¹ The Act goes on to provide, that "a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."²

§ 1438. Fourthly, with respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down, that if the questions relate to relevant facts, the answers may be contradicted by independent evidence; if to irrelevant, they cannot. It becomes, then, necessary to ascertain what matters connected with the witness are or are not *relevant*; and here, in addition to what has been stated in a former chapter,³ it should be observed, that inquiries respecting the previous conduct of the witness will almost invariably be regarded as irrelevant, provided such conduct be not connected with the cause or the parties. Therefore, if a witness be questioned on cross-examination respecting the commission of crimes by him on

¹ *Ward v. Sinfield*, 49 L. J., C. P. 696. This case was a decision on 17 & 18 V., c. 125, § 25, which contains almost identically the same language as the section cited in the text.

² This enactment is extended, by § 1, to "all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive and examine evidence," whether in England or Ireland. See, also, 17 & 18 V., c. 125, §§ 25, 103; and 19 & 20 V., c. 102, §§ 28, 29, Ir. In New York, "a witness must answer as to the fact of his previous *conviction* for felony." See Civ. Code, § 1854,

³ Ante, § 335, et seq.

some former occasion, his answers, except in the case of an actual conviction, must be taken as conclusive.¹ This rule extends to parties to the record, when giving testimony, as well as to other witnesses; and therefore, in an action for an indecent assault, where the defendant was examined as a witness on his own behalf, and denied the charge, the court held that, although he might be cross-examined with respect to alleged improprieties committed by him towards other persons, these collateral imputations could neither be disproved on the one hand, nor supported on the other, by independent evidence.²

§ 1439. The rule is founded on two reasons: first, that a witness § 1295 cannot be expected to come prepared to defend all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues.³ The rejection of the contradictory testimony may indeed sometimes exclude the truth; but this evil, acknowledged though it be, is as nothing compared with the inconveniences that must arise were a contrary rule to prevail.⁴ The case of *Alcock v. The Royal Exchange Insurance Company*⁵ forms no real exception to the above rule. There, an action was brought by a shipowner against underwriters on a policy of insurance, and the plaintiff's claim to recover as for a total loss rested on the abandonment of the vessel by the captain. The captain was called as a witness for the plaintiff, and, on cross-examination, denied that previous to the voyage insured against he had been an habitual drunkard. The defendants thereupon called witnesses to establish that fact, and the court held that their evidence was clearly admissible, as tending to show that the captain was not likely to have exercised a sound judgment in reference to the abandonment, and that, consequently, the judg-

¹ *Goddard v. Parr*, 24 L. J., Ch. 784.

² *Tolman & Ux. v. Johnstone*, 2 Fost. & Fin. 66, per Cockburn, C. J., after consulting the other judges. See, also, *Baker v. Baker*, 32 L. J., Pr. & Mat. 145; 3 Swab. & Trist. 213, S. C.

³ *Att.-Gen. v. Hitchcock*, 1 Ex. R. 93, 94, per Parke, B., 103, 104, per Alderson, B.

⁴ *Att.-Gen. v. Hitchcock*, 1 Ex. R. 105, per Rolfe, B.

⁵ 13 Q. B. 292.

ment actually exercised by him was not entitled to any respect from the jury.

§ 1440. Whether questions respecting the *motives, interest, or* § 1296 *conduct* of the witness, as connected with the cause, or with either of the parties, are irrelevant, is a point on which the authorities differ. On the one hand, it has been held relevant to the guilt or innocence of a person charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he had not expressed feelings of hostility towards the prisoner;¹ and the like inquiry has been made in a civil action.² So, also, in an action upon a promissory note, the execution of which was disputed, it was held material to ask the subscribing witness, whether she was not the plaintiff's kept mistress.³ In all these cases, the witness under cross-examination denied the fact imputed, and was exposed to contradiction by other witnesses. So, on an indictment for rape, or for an attempt to commit that crime, it seems that the prosecutrix may, on cross-examination, be asked whether she had not on former occasions consented to the prisoner's embraces; and if she denies that fact, the better opinion is, that witnesses may be called to contradict her.⁴ So, on the trial of Lord Stafford for high treason, his lordship was allowed to adduce proof that one of the witnesses for the prosecution had attempted to suborn several persons to give false evidence against him;⁵ and in the Queen's case, the judges appear to have considered such a course unobjectionable, provided the witnesses were first cross-examined upon the subject.⁶

§ 1441. On the other hand it is said to have been several times § 1297

¹ R. v. Yewin, 2 Camp. 638, per Lawrence, J.

² Attwood v. Welton, 7 Conn. 66.

³ Thomas v. David, 7 C. & P. 350, per Coleridge, J.

⁴ R. v. Martin, 6 C. & P. 562, per Williams, J.; recognised by Kelly, C. B., in R. v. Holmes & Furness, 1 Law Rep., C. C. 337; 41 L. J., M. C. 14, S. C.; and by Byles, J., in S. C., 41 L. J., M. C. 13.

⁵ 7 How. St. Tr. 1400.

⁶ 2 B. & B. 311. Recognised by Parke, B., in Att.-Gen. v. Hitchcock, 1 Ex. R. 94.

ruled of late years, that, if a witness denies that he has tampered with the other witnesses, evidence to contradict him cannot be received.¹ So, where a witness called to character, denied having ever said that the prisoner should be acquitted if it cost him 20*l.*, the court decided that the counsel for the prosecution must rest satisfied with the answer;² and in a civil action, where the defendants sought to disparage the testimony of a witness of the plaintiff, by proving some circumstances indicating a hostile spirit towards themselves, the learned judge is reported to have held that it could not be done.³ Again, where the principal witness against a man indicted for theft, was his apprentice, who, being asked in cross-examination whether he had not been charged with robbing his master, denied the fact, the prisoner's counsel was not allowed to prove that the answer was false.⁴ So, also, on indictments for rape, or for an attempt to commit rape, or for an indecent assault, though the principal female witness may be cross-examined with the view of showing that she has previously been guilty of incontinence with other men, yet her answers to such questions must be taken as conclusive, and her supposed paramours cannot be called as witnesses for the purpose of contradiction.⁵ The same law would seem to apply in actions for seduction, and on summonses for affiliation, unless the evidence would directly tend to show that the defendant was not in point of fact the father of the child.⁶

¹ *R. v. Lee*, 2 *Lew. C. C.* 154, per Coleridge, J.; *Harris v. Tippet*, 2 *Camp.* 637, per Lawrence, J.

² *R. v. Lee*, 2 *Lew. C. C.* 154, per Coleridge, J.

³ *Harrison v. Gordon*, 2 *Lew. C. C.* 156, per Alderson, B.

⁴ *R. v. Yewin*, 2 *Camp.* 638, per Lawrence, J.

⁵ *R. v. Holmes & Furness*, 41 *L. J.*, *M. C.* 12; 12 *Cox*, 137; 1 *Law Rep.*, *C.* 334, *S. C.*, per five Judges in *Ct. of Cr. Ap.*; affirming *R. v. Hodgson*, *R. & R.* 211, and overruling *R. v. Robins*, 2 *M. & Rob.* 512. See, also, *R. v. Cockcroft*, 11 *Cox*, 410; ante, § 363.

⁶ *Garbutt v. Simpson*, 32 *L. J.*, *M. C.* 186; 2 *New Rep.* 276, per Q. B., *S. C.* In *Verry v. Watkins*, 7 *C. & P.* 308, Alderson, B., in an action of seduction allowed witnesses, irrespective of the question of paternity, to give evidence of their having had connexion with the plaintiff's daughter. *Sed qu.*, since the last decisions. See, also, on this subject, and attempt to reconcile, *Andrews v. Askey*, 8 *C. & P.* 7, per Tindal, C. J.; and *Dodd v. Norris*, 3 *Camp.* 519, per *Ld. Ellenborough*.

§ 1442. Such being the conflict of authorities, it is no easy matter to apply the rule with precision to any new combination of facts; but probably a sensible lawyer, who was really anxious to promote the interests of truth and justice, would on most occasions feel inclined to follow the former, rather than the latter, class of cases. Indeed this view of the law is strongly confirmed by a case in the Exchequer, where the learned Barons intimated a tolerably decisive opinion, that a witness might be asked any *questions* tending to *impeach his impartiality*, and that his answers might be contradicted by other witnesses.¹ No doubt it is an object of great importance to confine the attention of the jury as much as possible to the specific issues; but it seems highly essential to the discovery of truth, that those, who are to determine the respective value of conflicting testimony, should be enabled to discriminate between the interested and disinterested witnesses; and no test of interest can be more sure than that which is afforded by the conduct of the witness himself. The argument that a witness cannot come prepared to defend himself against particular charges without notice, may be a very good reason why evidence that he has been guilty of a specific crime, *unconnected with the cause or parties*, should not be adduced;—because, even were such a fact proved, it would raise, in the absence of interest, only a very faint presumption that he had been guilty of perjury;—but this argument should not be allowed to extend to a case, where the charge, if true, would show that the witness either had a motive to swear falsely, or was not very scrupulous in the selection of means to attain his end. A charge, too, of this nature would, almost of necessity, apply to some act of recent date, and as such might be easily explained or rebutted by the witness, if it were made without foundation. Moreover, this inquiry would seem at the present day to be all the more necessary, as witnesses are no longer incompetent to testify on the ground of interest or crime. § 1298

§ 1443. Assuming, however, that a witness may in all cases be. § 1299

¹ Att.-Gen. v. Hitchcock, 1 Ex. R. 94, 100, 102.

cross-examined, and, if necessary, contradicted, for the purpose of showing that his mind is not in a state of impartiality as between the two contending parties, it must clearly appear, before the contradictory evidence can be admitted, that the questions answered had a direct tendency to prove that the witness was under the influence of an undue bias. This doctrine was established by the case of the Attorney-General *v. Hitchcock*.¹ That was an information under the revenue laws, and a witness, who had given material evidence for the Crown, was asked, on cross-examination, whether he had not *said* that the officers of the Crown had *offered* him 20*l.* to give that evidence. He denied that he had ever said so, and the Court held that evidence to contradict him was inadmissible. Nor can it be doubted but that this decision was correct; for as the mere offer of a bribe, if unaccepted, could not in fairness prejudice the character of the party to whom it was made, it was obviously immaterial what the witness might have said upon the subject. Had the witness been asked whether he had said that he had *received* a bribe, and had he denied that he had ever made such a statement, the decision might have been very different.

§ 1444. Since the case of the Attorney-General *v. Hitchcock* § 1299A was decided, the rule of law supposed to have been laid down by that decision, has been elaborately discussed in the Irish Court of Criminal Appeal.² The question arose in this way. On the trial of a prisoner for rape, a witness was called on his behalf, who professed his inability to speak English. He was therefore sworn in Irish, and he enjoyed the advantage,—which to a dishonest witness is no slight one,—of giving his evidence through an interpreter.³ On cross-examination he was pressed as to his knowledge of the English language, and was pointedly asked whether he had not very recently spoken English to two persons who were present in court. He denied that he had done so, and these two persons were called to contradict him. The question was whether their testimony was admissible. Ten of the learned judges heard the

¹ 1 Ex. R. 91. This case deserves an attentive perusal.

² R. v. Burke, 8 Cox, 44.

³ See ante, § 56.

argument; seven held that the evidence could not be received, while three were of opinion that it could.¹ The arguments advanced by the minority in this case are certainly entitled to grave consideration, and might yet very possibly be upheld in England, should the same point arise here.

§ 1445. However this may be, it is certainly relevant to put to a witness any question, which, if answered in the affirmative, would qualify or contradict some previous part of his testimony given on the trial of the issue; and if such question be put, and be answered in the negative, the opposite party may then contradict the witness, and for this simple reason, that the contradiction would qualify or contradict the previous part of the witness's testimony, and so neutralise its effect.² In accordance with this general principle, a witness may be cross-examined as to a *former statement* made by him *relative to the subject-matter of the cause*, and inconsistent with his present testimony; and if he either denies, or does not distinctly admit, that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given,³ the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.⁴ So, if the case be such as to

¹ The three dissenting judges were O'Brien, J., Pigot, C. B., and that profound lawyer, Pennefather, B.

² *Att.-Gen. v. Hitchcock*, 1 Ex. R. 102, per Alderson, B.

³ This rule prevails in Equity, *Hemming v. Maddick*, 41 L. J., Ch. 522, per Lds. Js.

⁴ See *Angus v. Smith*, M. & M. 473; *Crowley v. Page*, 7 C. & P. 789; *Andrews v. Askey*, 8 C. & P. 7; *Magrath v. Browne*, Arm. M. & O. 133; *The Queen's case*, 2 B. & B. 313, 314; 2nd Rep. of Com. Law Commis. 18, 19; 17 & 18 V., c. 125, § 23, which enacts, that "if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." This enactment has been extended to "all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence," whether in England or in Ireland; 17 & 18 V., c. 125, § 103; 19 & 20 V., c. 102, §§ 26, 98, Ir.; 28 & 29 V., c. 18, §§ 1, 4. It overrules *Pain v. Beeston*, 1 M. & Rob. 20; and *Long v.*

render evidence of opinion admissible and material, as, for instance, if the witness has been examined as to his *belief* respecting the identity, or the handwriting, or the sanity of any person, or if he be a skilled witness called to state his opinion on a matter of science, he may be asked on cross-examination, whether he has not on some particular occasion expressed a different opinion upon the same subject; and if he deny the fact, it may be proved by other evidence. But¹ if a witness has simply testified to a fact, his previous *opinion* as to the *merits of the cause* cannot be regarded as relevant to the issue.² Therefore, in an action upon a marine policy, where the broker, who had effected the policy for the plaintiff, stated as a witness for the defendant that he had omitted to disclose a certain fact, now contended to be material to the risk, and on being cross-examined, as to whether he had not expressed his opinion that the defendant had not a leg to stand upon, denied that he had said so; this was deemed conclusive, and evidence to contradict him in this particular was rejected.³

§ 1446. When the contradictory statement alleged to have been made by the witness was contained in a letter or other *writing*, the rule, as laid down by the judges in the Queen's case,⁴ was that the cross-examining counsel must produce the document as his evidence, and have it read, in order to found any questions to the witness upon it. This rule, however,—excluding, as it did, one of the best tests by which the memory and integrity of a witness can be tried,⁵—has been abrogated by the Legislature; and a witness examined in any court of judicature, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England⁶ or in Ireland, may now⁷ “be cross-

Hitchcock, 9 C. & P. 619. See *R. v. Whelan*, 14 Cox, 595, per May, C. J., in Ireland.

¹ Gr. Ev. § 449, almost verbatim. ² *Daniels v. Conrad*, 4 Leigh, R. 401, 405.

³ *Elton v. Larkins*, 5 C. & P. 385, 390, 391, per Tindal, C. J.

⁴ 2 B. & B. 286—290, 292—294; *Macdonnell v. Evans*, 11 Com. B. 930.

⁵ See per Ld. Brougham, in Ed. Rev., vol. 69, p. 22; and Speech on Law Reform, vol. 2, Ld. Brougham's Speech. p. 447.

⁶ Or in India, see Ind. Evid. Act of 1855, § 34.

⁷ See §§ 24 & 103 of “The Common Law Procedure Act, 1854,” 17 & 18 V., c. 125; §§ 27 & 98 of “The Common Law Procedure Amendment Act (Ireland), 1856,” 19 & 20 V., c. 102; and §§ 1 & 5 of 28 & 29 V., c. 18.

examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, indictment, or proceeding, without such writing having been shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."¹

§ 1447.² If it should appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been *lost* or *destroyed*, the proviso just cited, empowering the judge to require its production, will of course become operative. In such a case, therefore, it is apprehended that the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that, if it were material to the issue, he might be afterwards contradicted by secondary evidence. Still the question remains, as to whether the cross-examining party might first *interpose evidence out of his turn*, to prove the loss or destruction of the document, or to show that it was in the hands of the opponent, that he had had notice to produce it, and that he refused to do so; and might then cross-examine the witness as to its contents.³ In former times this course was deemed irregular,⁴ but modern authorities are not wanting to show that it would now be generally allowed. Thus, if the paper in question be not in the actual possession of the cross-examining party, he may, before commencing his cross-examination, or during its progress, direct any person, whom he has served with a subpoena duces tecum, to produce the writing,⁵ or call upon the adversary to do so, if the paper is in his hands, and he has had

¹ The reasons for this change in the law are ably stated by the Com. Law Commis. in their 2nd Rep., pp. 19—21. See, also, the 1st Ed. of this Work, § 1057.

² Gr., Ev. § 464, slightly as to first eight lines.

³ See 1 St. Ev. 205, n. d.

⁴ *Graham v. Dyster*, 2 Stark. R. 23, per Ld. Ellenborough; *Sideways v. Dyson*, id. 49, per id.

⁵ *Att.-Gen. v. Bond*, 9 C. & P. 189, per Ld. Abinger.

notice to produce it.¹ The counsel for a prisoner has also been allowed to interpose proof of the loss of the original depositions, and of the correctness of a copy, and then to cross-examine the witness, the copy being first duly read.² In another case, a witness was permitted to be cross-examined upon an office copy of an affidavit made by her, the affidavit itself being filed, and the cross-examining counsel having put in an order to admit the document to be a true copy.³ If,⁴ in any particular case, this course of proceeding would be likely to occasion inconvenience, by disturbing the regular progress of the cause and distracting the attention of the jury, the judge would be empowered to postpone the examination as to this point to a later stage in the trial.⁵

§ 1448. Another point on which a doubt may be entertained § 1303 respecting the true meaning of the proviso, is this. Let it be assumed that the object of the cross-examining counsel is to discredit a witness, by showing that he has previously told a different tale in some affidavit, deposition, or pleading, which has been duly filed of record. The question then will be, whether, in the event of the judge requiring "the production of the writing for his inspection," it will be necessary that the *original* should be forthcoming, or whether an office⁶ or examined copy will suffice. The doubt arises from the case of *Bastard v. Smith*,⁷ in which Chief Justice Tindal is reported to have held at Nisi Prius, that a plaintiff's counsel had no right, under the old law, to cross-examine one of the defendant's witnesses on the contents of his own affidavit, without putting the *original* into his hands to refresh his memory. The grounds for this decision are not stated in the report; and as the case is certainly opposed to a variety of decisions,⁸ and, moreover, contravenes the very salutary rule, which

¹ *Calvert v. Flower*, 7 C. & P. 386, per Ld. Denman.

² *R. v. Shellard*, 9 C. & P. 279, per Patteson, J.

³ *Davies v. Davies*, 9 C. & P. 252. No order in such a case would now be necessary; see Rules of Sup. Ct., 1883, Ord. XXXVII., R. 4, cited post, § 1538; also, Ord. XXXVIII., R. 15.

⁵ 2 Ph. Ev. 439, 440.

⁶ See n. 3, supra.

⁴ Gr. Ev. § 464, in part.

⁷ 10 A. & E. 214.

⁸ *Ewer v. Ambrose*, 4 B. & C. 24; *Highfield v. Peake*. M. & M. 109; *Davies v. Davies*, 9 C. & P. 252, per Gurney, B.; *Sainthill v. Bound*, 4 Esp. 74; *Garvin v. Carroll*, 10 Ir. Law R. 323.

protects from removal the records of courts of justice, it is submitted that little, if any, weight should be attached to it. When an office or examined copy is used, some difficulty may doubtless arise in identifying the witness with the person who swore to the truth of the original document, and in order to obviate this inconvenience, it may occasionally be prudent to produce the record itself;¹ but this is a very different matter from holding that the record *must* be produced.

§ 1449. As the enactment under discussion is now applicable to courts of criminal jurisdiction,² as well as to civil courts, it would seem that the rules laid down by the judges as to the *mode of cross-examining witnesses* for the Crown, *with respect to what they have previously sworn before the magistrate*, are no longer in force. Still, as some doubts³ may possibly be entertained on this subject, seeing that the statute in question contains a proviso expressly empowering the judge “to require the production of the writing,” and “to use it for the purposes of the trial,” it may be desirable to set out the rules. They are, then, as follows:—

“1. Where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner’s counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and such deposition must be read as part of the evidence of the cross-examining counsel.

“2. After such deposition has been read, the prisoner’s counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner’s counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed

¹ See *Garvin v. Carroll*, 10 Ir. Law R. 330, per Crampton, J., while commenting on *Rees v. Bowen*, McClel. & Y. 383.

² 28 & 29 V., c. 18, §§ 1, 5.

³ It is hoped that the judges may ere long resolve these doubts, either by rescinding the rules, or by some judicial announcement.

variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

"3. The witness cannot in cross examination, be compelled to answer, whether he did or did not make such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination;¹ and if the witness admits such statement to have been made, he may comment upon such admission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply."²

§ 1450. In accordance with these rules, it has been held that a witness for the prosecution could not be directed by the prisoner's counsel to look at his deposition and then say whether he still adhered to the statement he had just made, but the deposition had first to be read as evidence for the prisoner, and the witness might afterwards be cross-examined respecting its contents.³ Neither could a witness for the Crown be asked generally, on cross-examination, whether he had always told the same story, but the question had to be qualified by adding, "except when you were before the magistrate or coroner."⁴ The rules, however, were confined to those cases in which the depositions had been duly taken and returned, and when, consequently, they would furnish the best evidence of what took place at the prior examination.⁵ Neither

¹ *R. v. Curtis*, 2 C. & Kir. 763.

² 7 C. & P. 676.

³ *R. v. Ford*, 2 Den. 245; 2 C. & Kir. 113; 5 Cox, 184, S. C.; *R. v. Palmer*, 5 Cox, 236; *R. v. Stokes*, 4 Cox, 451; *R. v. Brewer*, 9 Cox, 409.

⁴ *R. v. Holden*, 8 C. & P. 609, per Patteson, J.; *R. v. Shellard*, 9 id. 280, per id. See *R. v. Price*, 7 Cox, 405.

⁵ *R. v. Griffiths*, 9 C. & P. 476, per Coleridge, J., and Gurney, B.

did they protect a witness from cross examination as to what he had said prior to his giving his testimony before the magistrate in the presence of the prisoner, although his words might have been taken down officiously by the magistrate's clerk, and might have been afterwards verified on oath by himself when examined by the justice, so that they actually appeared in the deposition as formally returned.¹ It seems, too, that the rules were merely intended to check the licence of the bar, and were not binding on the judges themselves, who had still a discretionary power of questioning the witness as to any discrepancy between his evidence in court and his former statement, without first putting in the depositions; but it may be questionable whether in such a case, if new facts were introduced in evidence, the counsel for the prosecution would not have been entitled to reply.²

§ 1451. The rule which requires the attention of the witness to § 1306 be specially drawn to the circumstances, in respect of which it is proposed to impeach his credit by independent evidence, is not confined to the case where the witness is alleged to have made contradictory statements, but it extends alike to all cases where declarations made by a witness, or acts done by him, are tendered in evidence with the view either of contradicting his testimony in chief, or of proving that he is a corrupt witness, or that he has been guilty of attempting to corrupt others.³ "I like the broad rule," said Mr. Justice Patteson on one occasion, "that when you mean to give evidence of a witness's declarations *for any purpose*, you should ask him whether he ever used such expressions."⁴ The case which called forth these observations was an action for seduction, and the court seems to have considered,—though the point was not decided,—that for the purpose of reducing the damages, the defendant, without first cross-examining the principal female witness, might call persons to specify particular language of an indecent and unbecoming character as having been used by her;

¹ *R. v. Christopher*, 4 Cox, 76; 1 Den. 536; 2 C. & Kir. 994, S. C.

² *R. v. Edwards*, 8 C. & P. 26; *R. v. Peel*, 2 Fost. & Fin. 23, per Willes, J.

³ *The Queen's case*, 2 B. & B. 311.

⁴ *Carpenter v. Wall*, 11 A. & E. 804.

but it is submitted that in strictness this course could not be pursued, but that the defendant in such a case should be restricted to general evidence of lightness of conduct.

§ 1452. Questions not unfrequently arise at *Nisi Prius*, as to § 1307 whether or not a party is entitled to see a document, which has been shown to one of his witnesses while under cross-examination by his opponent. The cases on this subject are somewhat conflicting; but the practice seems to be as follows:—If the cross examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity,¹ or respecting the character of the handwriting,² his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness,³ or if any questions be put respecting its contents,⁴ a sight of the document may then be demanded by the opposite counsel.

§ 1453. It has already been casually observed, that some ques- § 1308 tions a witness is *not compellable to answer*. First, this is the case, where the answers would have a *tendency* to expose the witness,⁵ or, as it seems, the husband or wife of the witness,⁶ to any kind of *criminal charge*, whether in the common law or ecclesiastical⁷ courts, or to a *penalty* or *forfeiture*⁸ of any nature whatsoever.⁹

¹ *Collier v. Nokes*, 2 C. & Kir. 1012, per Wilde, C. J.

² *Cope v. Thames Haven Dock Co.*, 2 C. & Kir. 757, per Erle, J.; *Sinclair v. Stevenson*, 1 C. & P. 583, per Best, C. J.; *Russell v. Rider*, 6 C. & P. 416, per Bosanquet, J.

³ *Ante*, § 1413.

⁴ *Cope v. Thames Haven Dock Co.*, 2 C. & Kir. 757.

⁵ *R. v. Garbett*, 1 Den. 236; 2 C. & Kir. 474, S. C.

⁶ *Cartwright v. Green*, 8 Ves. 405; *R. v. All Saints, Worcester*, 6 M. & Sel. 200, per Bayley, J.; *ante*, § 1369.

⁷ *Parkhurst v. Lowten*, 1 Mer. 391; 2 Swanst. 215, S. C., as to simony; *Brownsword v. Edwards*, 2 Ves. Sen. 245, as to incest; *Chetwynd v. Lindon*, id. 450, and *Finch v. Finch*, id. 493, as to concubinage.

⁸ *Qu.* as to the meaning of this word, *Pye v. Butterfield*, 34 L. J., Q. B. 17; 5 B. & S. 829, S. C.

⁹ *R. v. Freind*, 13 How. St. Tr. 16—18; *R. v. Ld. G. Gordon*, 2 Doug. 593; 21 How. St. Tr. 650, S. C.; *R. v. Ld. Macclesfield*, 16 How. St. Tr. 1146—1150; *R. v. Slaney*, 5 C. & P. 213, per Ld. Tenterden; *R. v. Pegler*, id. 521, per Littledale & Park, Js.; *Maloney v. Bartley*, 3 Camp. 210, per (4112)

This rule,—which is of great antiquity, and was even acted upon by Chief Justice Jefferies when it told *against* the prisoner,¹—applies equally to parties and to witnesses, and it is now uniformly recognised by all British Tribunals, whether civil or criminal. Thus no *party* can be compelled to *discover* that, which, if answered, would tend to subject him to any punishment,² penalty,³ forfeiture,⁴ or ecclesiastical censure,⁵ however material the answer may be to his adversary's case.⁶ Neither will a witness be forced to answer questions or interrogatories of a like tendency;⁷ although, if any such interrogatories be administered, they will not, on that account, be struck out by the Court.⁸ The same doctrine prevails in the Spiritual Courts,⁹ and is also part and parcel of the law of Scotland.¹⁰ Some of the older decisions on this subject are calculated to make us feel the advantage of living at a time when freedom of conscience is at length fully established.¹¹ Thus, in the reign of William the Third, and again so late as the year 1781, we find witnesses protected from answering the simple question whether they were protestants or papists.¹²

Wood, B.; *Dandridge v. Corden*, 3 C. & P. 11, per Ld. Tenderden; *Chester v. Wortley*, 17 Com. B. 410. But see *R. v. Boyes*, 30 L. J., Q. B. 301; 1 B. & S. 311, S. C., cited post, § 1458.

¹ *R. v. Rosewell*, 13 How. St. Tr. 169.

² *Macallum v. Turton*, 2 Y. & J. 183; *Paxton v. Douglas*, 19 Ves. 225; *Thorpe v. Macaulay*, 5 Madd. 229, 231, n. s; *Claridge v. Hoare*, 14 Ves. 59, 65; *McIntyre v. Mancius*, 16 Johns. 592.

³ See cases cited in last note.

⁴ *Parkhurst v. Lowten*, 1 Mer. 401, 402; *Ld. Uxbridge v. Staveland*, 1 Ves. Sen. 56; *Bp. of Cork v. Porter*, I. R., 11 C. L. 94. As to the distinction between a forfeiture and a conditional limitation respecting which no protection is allowed, see *Hambrook v. Smith*, 17 Sim. 209, 216—218.

⁵ See cases cited ante, p. 1242, n. 7.

⁶ *Wigr. Disc.* 80, 81, 192, 193, and cases there cited; *Story*, Eq. Pl. §§ 524, 576, 577, 592—598. See *Chadwick v. Chadwick*, 22 L. J., Ch. 329, per *Turner*, V.-C.

⁷ *Paxton v. Douglas*, 16 Ves. 239; *Lamb v. Munster*, 52 L. J., Q. B. 46; L. R., 10 Q. B. D. 110, S. C.

⁸ *Fisher v. Owen*, 47 L. J., Ch. 681; L. R., 8 Ch. D. 645, per Ct. of App., S. C. This case overrules *Atherley v. Harvey*, 46 L. J., Q. B. 518; L. R., 2, Q. B. D. 524, S. C. See *Bp. of Cork v. Porter*, I. R., 11 C. L. 94.

⁹ *Swift v. Swift*, 4 Hagg. Ec. R. 154; *King v. King*, 2 Roberts. 153.

¹⁰ *Alison*, Pract. of Cr. L. 527.

¹¹ See 7 & 8 V., c. 102; and 9 & 10 V., c. 59.

¹² *R. v. Freind*, 13 How. St. Tr. 16—18; *R. v. Ld. G. Gordon*, 21 id. 650; 2 Doug. 593, S. C.

§ 1454. Other cases, again, amply justify a doubt, as to whether the protection has not been carried very far beyond its legitimate bounds.¹ Thus, in an action for a libel, contained in a voluntary affidavit, which the defendant had sworn extra-judicially before a magistrate, the court held that the magistrate's clerk was not bound to answer, whether he wrote the affidavit by the defendant's orders, and delivered it to the magistrate;² and it has been decided in Ireland, that, upon a trial for the murder of a person killed in a duel, any person who was present, and in any way countenanced the proceeding, might refuse to answer any question relating thereto.³ It is not here intended to insinuate, that these cases are wrong decisions; for numerous authorities might be cited, which clearly establish, that if the fact to which the witness is interrogated, forms but a *single remote link* in the chain of testimony, which *may* implicate him in a crime or misdemeanor, or expose him to a penalty or forfeiture, he is not bound to answer;⁴—but it is suggested, that, where the question is *material to the issue*, it should be left to the discretion of the judge, whether or not he will enforce an answer, having due regard to the general interests of justice; provided always, that if an answer be enforced, it should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates, or at least, such answer should not be admissible

¹ In New York the protection is far more limited than in England. See Civ. Code, § 1854, which enacts, that a witness “need not give an answer, which will have a tendency to subject him to punishment for a *felony*.” This seems to be the sound rule.

² *Maloney v. Bartley*, 3 Camp. 210, per Wood, B.

³ *R. v. Handcock*, Ir. Cir. R. 329, per Brady, C. B. For other instances of injustice occasioned by the stringency of this rule, see *Brownsword v. Edwards*, 2 Ves. Sen. 245; *Sharp v. Carter*, 3 P. Wms. 375; *Claridge v. Hoare*, 14 Ves. 59. See, also, some very sensible observations on this subject in the *Law Rev.*, No. xiii., pp. 19—30.

⁴ *Cates v. Hardacre*, 3 Taunt. 424; *Macallum v. Turton*, 2 Y. & J. 183, 195; *Parkhurst v. Lowten*, 2 Swanst. 215; *Paxton v. Douglas*, 16 Ves. 242, and 19 Ves. 227, 228; *Harrison v. Southcote*, 1 Atk. 518; *Swift v. Swift* 4 Hagg. Ec. R. 154; *King v. King*, 2 Roberts. 153; *M'Mahon v. Ellis*, 10 Ir. Law R., N. S. 120; *The People v. Mather*, 4 Wend. 229, 252—254; 1 Burr's Trial, 245; *Southard v. Rexford*, 6 Cowen, 254, 255; *Bellinger v. The People*, 8 Wend. 595.

evidence in any future criminal proceedings instituted against the witness.¹

§ 1455. On several occasions, the Legislature has acted on this principle, and has either directly deprived the witness of the privilege, or by an Act of indemnity, has rendered it valueless. Thus, the Larceny Act, 1861, contains a special enactment, that nothing therein which relates to frauds committed by bankers, factors, trustees, directors, solicitors, or their agents,² “shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors” in that Act mentioned relative to such frauds, “by *any evidence whatever* in respect to any act done by him, if he shall at any time previously to his being charged with such offence have first *disclosed*³ such act *on oath*, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, which shall have been bona fide instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court, upon the hearing of any matter in bankruptcy or insolvency.”⁴ The same statute further enacts, that nothing therein shall prevent, lessen, or impeach any remedy, which any party aggrieved by any such fraud may have; but no conviction of any such offender shall be received in evidence in any action against him.⁵ A similar law prevails with respect to persons charged with stealing, or fraudulently destroying or concealing, any title deed or will;⁶ and somewhat similar clauses are also inserted in “The Poisoned Grain Prohibition Act, 1863,”⁷ in “The Exhibition Medals Act; 1863,”⁸ in “The Merchandise Marks Act, 1862,”⁹ and “The Record of

¹ See Law Rev., No. xiii., pp. 28—30.

² 24 & 25 V., c. 96, §§ 75—84.

³ This word means the discovery of that which was before unknown, and not the statement of that which was before known. *R. v. Skeen & Freeman*, 28 L. J., M. C. 91; 8 Cox, 143, S. C., per 9 Js., 5 Js. diss.; *Bell*, C. C. 97, S. C.

⁴ § 85. See *R. v. Strahan*, 7 Cox, 85.

⁵ § 86.

⁶ 24 & 25 V., c. 96, §§ 23 & 29.

⁷ 26 & 27 V., c. 113, § 5.

⁸ 26 & 27 V., c. 119, § 5.

⁹ 25 & 26 V., c. 88, § 11.

Title Act, Ireland, 1865,"¹ as well as in the Acts which have respectively been passed for the more effectual prosecution of the keepers of gaming houses,² for inquiring into corrupt practices at Parliamentary³ or municipal⁴ elections, and for regulating the trials of election petitions.⁵ So, when Parliamentary inquiries are instituted respecting gaming, and other illegal transactions, where the testimony of many persons implicated is required, Acts of indemnity are occasionally passed, with the view of absolving from punishment or penalty any witness, who shall make a faithful discovery of what he knows in relation to the matters under investigation.⁶

§ 1456. The law relating to printers, publishers, and proprietors of newspapers, was, by a bungling statute of the year 1869, thrown into a very discreditable state; for while those gentlemen, by a bill of discovery, might be forced to divulge their connexion with any paper in which a libel had appeared, they could successfully resist any attempt at common law to "scrape their consciences" through the medium of interrogatories.⁷ This anomaly, it is presumed, has been now remedied by Order XXXI., Rule 1, of the Rules of the Supreme Court, 1883, which,—as stated elsewhere,⁸—enables every plaintiff to deliver interrogatories in writing for the examination of his opponent.⁹ § 1310A

§ 1457. Whether the answer may tend to criminate the witness, § 1311

¹ 28 & 29 V., c. 88, § 59, Ir.

² 8 & 9 V., c. 109, § 9; 17 & 18 V., c. 38, §§ 5, 6.

³ See 15 & 16 V., c. 57, § 8; 17 & 18 V., c. 102, § 35; 31 & 32 V., c. 125, § 56, continued till 31 Dec., 1884, by 46 & 47 V., c. 51, § 70, and Sch. 3. See *R. v. Charlesworth*, 2 Fost. & Fin. 326; *R. v. Buttle*, 39 L. J., M. C., 115; 11 Cox, 566, S. C.; *R. v. Slator*, L. R., 8 Q. B. D. 267; 51 L. J., Q. B. 246, S. C.; *Ex p. Fernandez*, 10 Com. B., N. S. 3; *R. v. Leatham*, 3 E. & E. 658; *R. v. Hulme*, 5 Law Rep., Q. B. 377; 39 L. J., Q. B. 149, S. C.; *R. v. Holl*, L. R., 7 Q. B. D. 575, per Ct. of App.; 50 L. J., Q. B. 763, S. C.

⁴ 45 & 46 V., c. 50, 94, subs. 5—8, now repealed by 47 & 48 V., c. 70, § 38, but substantially re-enacted by § 30 of that Act.

⁵ 46 & 47 V., c. 51, § 59.

⁶ See 7 & 8 V., c. 7; and 14 & 15 V., c. 106.

⁷ *Bowden v. Allen*, 39 L. J., C. P. 217; 32 & 33 V., c. 24, re-enacting in Sch. 2, 6 & 7 W. 4, c. 76, § 19.

⁸ Ante, § 522.

⁹ See *Lefroy v. Burnside*, 14 Cox, 260.

or expose him to a penalty or forfeiture, is a point which the court will determine, under all the circumstances of the case, as soon as the protection is claimed; but without requiring the witness fully to explain how the effect would be produced; for if this were necessary, the protection which the rule is designed to afford to the witness would at once be annihilated.¹ It is now decided,—contrary to an opinion formerly entertained by several of the judges,²—that the mere declaration of a witness on *oath* that he *believes* that the answer will tend to criminate him, will not suffice to protect him from answering, when the other circumstances of the case are such as to induce the judge to believe that the answer would not really have that tendency.³ Still less will a defendant be protected, on “*submitting*” in his affidavit in answer to interrogatories,⁴ “that he was not bound to discover” certain matters, because the discovery would expose him to penalties.⁵ In all cases of this kind the court must see, from the surrounding circumstances, and the nature of the evidence which the witness is called to give, that reasonable grounds exists for apprehending danger to the witness from his being compelled to answer.⁶ When, however, the fact of such danger is once made to appear, considerable latitude should be allowed to the witness in judging for himself of the effect of any particular question; for it is obvious that a question, though at first sight apparently innocent, may, by affording a link in a chain of evidence, become the means of bringing home an offence to the

¹ The People v. Mather, 4 Wend. 253 254.

² See R. v. Garbett, 2 C. & Kir. 495; 1 Den. 258, S. C., Fisher v. Ronalds 12 Com. B. 762, per Jervis, C. J., and Maule, J.; Adams v. Lloyd, 3 H. & N. 361, 362, per Pollock, C. B.; and In re Mexican & S. Amer. Co., Ex p. Aston, 28 L. J., Ch. 634; 4 De Gex & J. 220; 27 Beav. 474, S. C.

³ Ex p. Reynolds, re Reynolds, L. R., 20 Ch. D. 294, per Ct. of App.; 15 Cox, 108; and 51 L. J., Ch. 756, S. C., following, with approval, R. v. Boyes, 30 L. J., Q. B. 301; 9 Cox, 32; 1 B. & S. 311, S. C.; Osborn v. London Dock Co., 10 Ex. R. 701, per Parke B.; Sidebottom v. Adkins, 27 L. J., Ch. 152, per Stuart, V.-C.; Ex p. Fernandez, 10 Com. B., N. S. 3, 39, 40, per Willes, J. See The Mary or Alexandra, 38 L. J., Adm. 29; 2 Law Rep., Adm. & Ecc. 319, S. C.

⁴ See Rules of Sup. Ct., 1883, Ord. XXXI., R. 6, cited ante, § 527.

⁵ Scott v. Miller, 1 Johns. 328.

⁶ R. v. Boyes, 30 L. J., Q. B. 301, 303, 304, per Cockburn, C. J.; 1 B. & S. 311, S. C. See Bunn v. Bunn, 3 New R. 679, per Lds. Js.; 4 De Gex, J. & S. 316, S. C.

party answering.¹ On the whole, as Lord Hardwicke once observed, "these objections to answering should be held to very strict rules;"² and, in some way or other, the court should have the sanction of an oath for the facts on which the objection is founded.³

§ 1458. If the prosecution to which the witness might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time;⁴ or if the offence has been pardoned,⁵ or the penalty or forfeiture waived; or if, in any other way, the reason for the privilege has ceased, the privilege itself will cease also, and the witness will be bound to answer.⁶ A witness, too, who has received a pardon under the great seal, will thereby loose his privilege, even though he may still, by virtue of the Act of Settlement,⁷ be exposed to the remote contingency of an impeachment by the House of Commons.⁸ Moreover, a witness cannot object to answer a question on the ground that he is a foreigner, and that his answer will render him liable to be prosecuted in his own country.⁹ This protection, too, has, possibly, not been imported, at least in all its strictness, into the *bankrupt law*;¹⁰ and although a mere witness,

¹ Id.

² Vaillant v. Dodemead, 2 Atk. 524.

³ Parkhurst v. Lowten, 2 Swanst. 203, per Ld. Eldon. See post, § 1466.

⁴ Roberts v. Allatt, M. & M. 192, per Ld. Tenterden; Parkhurst v. Lowten, 1 Mer. 400, per Ld. Eldon; The People v. Mather, 4 Wend. 229, 252—255; Williams v. Farrington, 2 Cox, Ch. R. 202; Davis v. Reid, 5 Sim. 443.

⁵ R. v. Boyes, 2 Fost. & Fin. 157, per Martin & Wilde, Bs.; 30 L. J., Q. B. 301, S. C., per tot. cur.; 9 Cox, 32; 1 B. & S. 311, S. C. This decision overrules two old cases, viz., R. v. Reading, 7 How. St. Tr. 296, and R. v. Shaftesbury, 8 id. 817.

⁶ R. v. Charlesworth, 2 Fost. & Fin. 326; Wigr. Disc. 83, 84, and cases there cited.

⁷ 12 & 13 W. 3, c. 2, § 3.

⁸ R. v. Boyes, 30 L. J., Q. B. 301; 1 B. & S. 311; 9 Cox, 32, S. C.

⁹ King of the Two Sicilies v. Willcox, 1 Sim. N. S. 301, 329—331, per Ld. Cranworth. But see U. S. v. M'Rae, 37 L. J., Ch. 129; 3 Law Rep., Ch. App. 79, S. C.; where Ld. Chelmsford, C., held, that a plea of penalties to which the defendant's answer may expose him in a foreign country, is a good plea to discovery, if the law of the foreign country clearly appears.

¹⁰ See as to the old law, R. v. Scott, 25 L. J., M. C. 128; 7 Cox, 164; and Dear. & Bell, 47, S. C., recognised by Ld. Campbell in Goode v. Job, 28 L. J., Q. B. 3; 1 E. & E. 9, S. C.; R. v. Cross, Dear. & Bell, 68; 7 Cox, 226, S. C.; R. v. Robinson, 1 Law Rep., C. C. 80; 36 L. J., M. C. 78, S. C.; 12 & 13 V.,

when summoned under § 27 of the Bankruptcy Act, 1883, is certainly not bound to answer criminative questions,¹ the debtor himself may, as it seems, be compelled to do so,² and the answers thus elicited will be admissible against him in any subsequent criminal prosecution.³

§ 1459. Secondly, it has been much debated, whether a witness § 1313 is bound to answer any question, the direct and immediate effect of answering which might be *to degrade his character*. On this subject the law still remains in a somewhat unsettled state, but thus much would seem to be clear; viz., that where the transaction, to which the witness is interrogated, forms *any material part of the issue*, he will be obliged to give evidence, however strongly it may reflect on his own conduct.⁴ Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, when his testimony might be necessary for the protection of the property, the reputation, the liberty, or the life of a fellow-subject, or might at least be required for the due administration of public justice. Were such a rule of protection to prevail, a man who had been convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape.

c. 106, §§ 117, 260; 20 & 21 V., c. 60, §§ 306, 385, Ir.; 24 & 25 V., c. 134, §§ 102, 189.

¹ In re Firth, ex p. Schofield, 46 L. J. Bk. 112, per Ct. of App.; L. R., 6 Ch. D. 230, S. C., nom. Ex. p. Schofield, in re Firth.

² 46 & 47 V., c. 52, § 17,—after empowering the court to examine upon oath the debtor as to his conduct, dealings, and property,—goes on to provide in subs. 8, that the debtor must “answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.” Under § 24, the debtor must also, at the first meeting of creditors, submit, among other things, to “such examination in respect of his property or his creditors,” “as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the court by any special order.”

³ R. v. Hillam, 12 Cox, 174, per Quain, J.; R. v. Cherry, id. 32.

⁴ See ante, §§ 1436, 1440.

§ 1460. Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the *character*, and consequent *credit*, of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show, that in such case the witness is not bound to answer;¹ but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times.² Even Lord Ellenborough,—who is reported to have held on one occasion,³ that a witness was not bound to state whether he had not been sentenced to imprisonment in a house of correction, and on another, that the question could not so much as be put to him,⁴—seems in a later case to have disregarded the rules thus enunciated by himself; for, on a witness declining to say whether or not he been confined for theft in gaol, his lordship harshly observed, “If you do not answer the question, I will send you there.”⁵ No doubt cases may arise, where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquires into discreditable transactions of a remote date, might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man’s life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. § 1314

§ 1461. But the rule of protection should not be further extended; for, if the inquiry relates to transactions comparatively § 1315

¹ *R. v. Cook*, 13 How. St. Tr. 334, 335, per Treby, C. J.; *R. v. Freind*, id. 17, per id.; *R. v. Layer*, 16 id. 161, per Pratt, C. J.; *R. v. O’Coigly*, 26 id. 1351—1353; *Macbride v. Macbride*, 4 Esp. 242, per Ld. Alvanley; *Dodd v. Norris*, 3 Camp. 519; *R. v. Hodgson*, R. & R. 211.

² *Parkhurst v. Lowten*, 1 Mer. 400, per Ld. Eldon; 2 Swanst. 216, S. C.; *Cundell v. Pratt*, M. & M. 108, per Best, C. J.; *Roberts v. Allatt*, id. 192, per Ld. Tenterden; *R. v. Edwards*, 4 T. R. 440. See, also, cases cited ante, § 1436, n. 2, and § 1441, n. 5.

³ *Millman v. Tucker*, Pea. Add. Cas. 222.

⁴ *R. v. Lewis*, 4 Esp. 226.

⁵ *Frost v. Holloway*, cited 1 St. Ev. 197, n. n; and 2 Ph. Ev. 428.

recent, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation;¹ but, on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause.²

§ 1462. However, the law may be ultimately determined on the point just discussed, it seems to be generally conceded, that where the answer, which the witness may give, will not immediately and certainly show his infamy, but will only *indirectly tend* to disgrace him, he may be compelled to reply.³ With respect, however, to questions which have a tendency to degrade the witness, as involving the fact of his previous bankruptcy or insolvency, it seems that an objection may be taken on the ground that such a fact can only in strictness be proved by the production of the record;⁴ for, although the parol admissions of *parties* are now receivable in evidence, notwithstanding they relate to the contents of deeds or records,⁵ witnesses cannot be forced in a court of justice to make any such admissions. Still, in practice it cannot be denied that questions of this nature are very frequently allowed to be put, and where the object is to discredit a witness, he is constantly asked in

¹ 1 St. Ev. 193.

² Id.

³ *Macbride v. Macbride*, 4 Esp. 242, per Ld. Alvanley; *Parkhurst v. Lowten*, 1 Mer. 400, per Ld. Eldon; 2 Swanst. 194, 216, S. C.; *The People v. Mather*, 4 Wend. 232, 252, 254, per Massey, J.; *Cundell v. Pratt*, M. & M. 108, per Best, C. J.

⁴ *Macdonnell v. Evans*, 21 L. J., C. P. 142, per Cresswell, J.; 11 Com. B. 935, S. C. But see *Henman v. Lester*, 31 L. J., C. P. 366; 12 Com. B., N. S. 776, S. C.

⁵ *Slatterie v. Pooley*, 6 M. & W. 664; *Earle v. Picken*, 5 C. & P. 542, per Parke, B. See ante, §§ 410—413.

cross examination whether he has not been insolvent, or has taken the benefit of the Bankrupt Act.¹

§ 1463.² At one time it was considered doubtful, whether a witness could be compelled to answer, where by so doing he would *subject himself to a civil action or pecuniary loss, or would charge himself with a debt.* This question was much discussed in Lord Melville's case; and being finally submitted to the judges, eight of them, with the Chancellor and Lord Eldon, were of opinion that a witness in such case was bound to answer, while four thought he was not.³ To remove the doubts, which such a diversity of opinion threw over the subject, a statute was passed,⁴ declaring "that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the Crown, or of any other person or persons."

§ 1464. Though the statute just cited does not in terms refer to the *production of documents*, its spirit seems strictly applicable to such a case; and accordingly it has been held, that a witness cannot be excused from producing papers in his possession, merely because their production may subject him to a civil action, or be otherwise prejudicial to his pecuniary interests.⁵ If, indeed, the documents called for be the title deeds of the witness, or,

¹ Macdonnell v. Evans, 21 L. J., C. P. 145, per Williams, J.; 11 Com. B. 945, S. C.

² Gr. Ev. 452, in part.

³ 6 Parl. Deb. 167—245.

⁴ 46 G. 3, c. 37. The law in New York is the same, Civ. Code, § 1854. In America the English Act is generally considered as declaratory of the true doctrine of the common law. See Bull v. Loveland, 10 Pick. 9; Baird v. Cochran, 4 Serg. & R. 397; Naylor v. Semmes, 4 Gill & J. 273; Stoddart v. Manning, 2 Har. & G. 147; Copp v. Upham, 4 New Hamps. 159.

⁵ Doe v. Date, 3 Q. B. 609, 618, per Patteson, J.; Doe v. Ld. Egremont, 2 M. & Rob. 386, per Rolfe, B. These cases appear to overrule Miles v. Dawson, 1 Esp. 405, and Laing v. Barclay, 3 Stark. R. 42.

perhaps, if they be instruments in the nature of title deeds, they will fall within the rule of protection;¹ because, in the present complicated state of the law of real property, it might cause infinite mischief, if witnesses were compellable to disclose by what title they held their estates. So, a witness, or a party in the cause, is not bound to produce any documents which may render him liable to punishment, or expose him to penalty or forfeiture,² unless they be of a public nature, or such as are directed by statute to be kept and produced.³

§ 1465. In all the cases hitherto put, where the witness is not compellable to answer, or to produce documents, the *privilege is his and not that of the party*;⁴ and, consequently, counsel in the cause will not be permitted to make the objection,⁵ Neither will the witness be allowed to employ counsel of his own to support his claim to protection.⁶ Nor even is the judge *bound*, as it would seem, to warn the witness of his right to demur to the question,⁷ though, in the exercise of his discretion, he may occasionally deem it proper to do so.⁸ At one time it was thought, that if a witness chose to reply in part, he might be compelled to answer everything relative to the transaction; but this doctrine has been overruled by a majority of the fifteen judges, and it is now finally determined that, after a witness has been sworn, he may claim his protection *at any stage of the inquiry*, and if he do so, he cannot be forced to answer any additional questions tending to criminate him. In

§ 1319

¹ Doe v. Date, 3 Q. B. 609; Pickering v. Noyes, 1 B. & C. 263; 1 St. Ev. 88.

² Parkhurst v. Lowten, 1 Mer. 400; 2 Swanst. 216, S. C.; Whitaker v. Izod, 2 Taunt. 115; R. v. Dixon, 3 Burr. 1687. But see R. v. Leatham, 8 Cox, 501, per Blackburn, J., et qu. See, also, R. v. Leatham, 3 E. & E. 658.

³ Bradshaw v. Murphy, 7 C. & P. 612.

⁴ R. v. Kinglake, 11 Cox, 499.

⁵ Thomas v. Newton, M. & M. 48, n., per Ld. Tenterden; R. v. Adey, 1 M. & Rob. 94, per id. See Marston v. Downes, 1 A. & E. 34, per Ld. Denman; and Doe v. Date, 3 Q. B. 609.

⁶ Doe v. Ld. Egremont, 2 M. & Rob. 386; Doe v. Date, 3 Q. B. 621, per Coleridge, J., citing a decision of Park, J.

⁷ Att.-Gen. v. Radloff, 10 Ex. R. 88, per Parke, B.

⁸ Paxton v. Douglas, 16 Ves. 242; Fisher v. Ronalds, 12 Com. B. 764, per Maule, J.; R. v. Boyes, 2 Fost. & Fin. 158, per Martin, B.

short, he cannot be carried further than he chooses voluntarily to go himself.¹

§ 1466. On two occasions attempts have been made to extend § 1320 to an unwarrantable length this protection against self-crimination. In the one case an action had been brought against Cardinal Wiseman for an alleged libel, to which the defendant had pleaded not guilty. At the trial before the Lord Chief Baron the plaintiff failed in his attempts to prove the fact of publication, and as a last resource he proposed to examine the defendant himself. The Cardinal through his counsel declined to be sworn, urging that, on the simple issue of "guilty or not guilty," no question could legally be put to him, the answer to which would not fall within the rule of protection, and that it was alike useless and vexatious to swear a man, when no evidence pertinent to the issue could be extracted from him. On the other hand it was urged with much force, that the objection had been taken too soon; that the plaintiff had a clear right to call his opponent as a witness, to cause an oath to be administered to him, and to ask him whatever questions he liked which were relevant to the issue; and that it was not until after the defendant had been sworn, and the questions had been put to him, that he was legally entitled to claim his protection. The learned judge erroneously ruled that the Cardinal need not be sworn, but the only result of this ruling was, that the parties were put to the annoyance and expense of a new trial, which in due course was granted by the Court of Exchequer.² The other case³ involved the same principle. It was an action of trover

¹ *R. v. Garbett*, 1 Den. 236; 2 C. & Kir. 474, S. C.—pro, Parke, Alderson, Rolfe, Platt, Bs., Coltman, Maule, Wightman, Cresswell, Williams, Js.; con. Ld. Denmn, Wilde, C. J., Pollock, C. B., Patteson, Coleridge, Erle, J.; King of the Two Sicilies *v. Wilcox*, 1 Sim. N. S. 301, 320, 321, per Ld. Cranworth. These cases overrule *Dixon v. Vale*, 1 C. & P. 278, per Best, C. J.; *East v. Chapman*, 2 C. & P. 573, per Abbott, C. J.; *M. & M.* 47, S. C.; and *Ewing v. Osbaldiston*, 6 Sim. 608; and confirm *Ex p. Cossens, re Warrall*, Buck, 531, 545, per Ld. Eldon. See, however, *Chadwick v. Chadwick*, 22 L. J., Ch. 329, per Turner, V.-C.

² *Boyle v. Wiseman*, 10 Ex. R. 647. The new trial was granted on the 26th Jan., 1855, and 1000*l.* damages were ultimately awarded.

³ *Osborn v. The London Dock Co.*, 10 Ex. R. 698. But see *Tupling v. Ward*, H. & N. 749; 30 L. J., Ex. 222, S. C.

brought by one Osborn against the London Dock Company for certain pipes of port wine. The defendants alleged that the plaintiff had deposited with them "sour wine," the produce of "rummage sales," and that afterwards, by some means which were not miraculous but fraudulent, the wine had been converted into "sound port." The theory was, that the sour wine had been recently abstracted, and the empty pipes had been refilled by tapping the other stores in the Dock. To assist the defendants in establishing this case, they applied to the court for leave to deliver interrogatories to the plaintiff, and the court, after argument, granted the application, although it was strenuously argued on behalf of the plaintiff, that as the sole object of the questions was to fix him with a guilty participation in the fraud, he had clearly a right to refuse to answer them.

§ 1467. It has been stated more than once, that, if the witness § 1321 declines to answer, no inference of the truth of the fact can be drawn from the circumstance;¹ but the soundness of this rule is very questionable; and although it would be going too far to say that the guilt of the witness *must* be implied from his silence, it would seem that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness.² A perfectly honourable but excitable man may occasionally repudiate a question, which he regards as an insult; and to infer dishonour from his conduct would, of course, be unjust;³ but generally speaking, an honest witness will be eager to rescue his character from suspicion, and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory.⁴

¹ *Rose v. Blakemore*; Ry. & M. 383, per Abbott, C. J.; *R. v. Watson*, 2 Stark. R. 158, per Holroyd, J.; 32 How. St. Tr. 495, S. C.; *Lloyd v. Passingham*, 16 Ves. 64, per Ld. Eldon; *Millman v. Tucker*, Pea. Add. Cas. 222, per Ld. Ellenborough.

² See per Bayley, J., in *R. v. Watson*, 2 Stark. R. 153; 32 How. St. Tr. 491, S. C.; Ry. & M. 384, 385, n.

³ 2 Ph. Ev. 429.

⁴ 1 St. Ev. 197.

§ 1468. It has before been shown, while treating of evidence § 1322 excluded from public policy,¹ that in certain other cases witnesses cannot be *compelled*, and in some they will not be *allowed*, to answer questions put to them; as, for instance, where they are interrogated with respect to privileged communications, secrets of State, and some other subjects. As these matters have been already discussed, it is unnecessary to make any further reference to them in the present chapter, excepting to state as a general rule of law, that a witness cannot object to answer any question, merely because it relates to private matters, or because it is immaterial, unless the answer can be withheld on some specific ground of privilege.²

§ 1469. Before leaving the subject of cross-examination, it will § 1323 be right to allude to the effect on the trial, which would be produced by the death or sickness of the witness between his examination in chief and his cross-examination. This subject was much canvassed in Ireland a few years back, in the case of *R. v. Doolin*,³ where a witness for the Crown having been suddenly taken ill on cross-examination, the question was, whether the conviction of the prisoner upon his testimony was legal. The twelve judges were almost equally divided in opinion, but the majority held that the conviction was good, and they drew a somewhat questionable analogy between this case, where the testimony had been stopped by the act of God, and that of dying declarations, or of depositions before coroners where the witness had died before the trial. In a case which came before a late Master of the Rolls, a witness made an affidavit, and died before she could be cross-examined. Under these circumstances, an objection was taken that the affidavit could not be received in evidence, but Lord Romilly thought otherwise, and admitted it at the hearing.⁴

§ 1470.⁵ After a witness has been examined in chief, his *credit* § 1324

¹ Ante, Part ii., Chap. xvi.

² *Tippins v. Coates*, 6 Hare, 16.

³ *Jebb*, C. C. 123.

⁴ *Davies v. Otty*, 35 Beav. 208; *Elias v. Griffith*, 46 L. J., Ch. 806, per Hall, V.-C. But see, *Dunne v. English*, 18 Law Rep., Eq. 524, per Jessel, M. R.

⁵ Gr. Ev. § 461, in part.

may be impeached, not only by means of cross-examination, but in various other modes. First, witnesses may be called to disprove such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue;¹ next, proof may be given, under certain restrictions as before pointed out,² of statements made by the witness inconsistent with his testimony at the trial; and thirdly, evidence may be adduced reflecting on his *character for veracity*.³ But here the evidence must be confined to his *general reputation*, and will not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared, without notice, to answer the other.⁴ Besides, the mischief of raising collateral issues would itself be a sufficient reason for the adoption of this rule.⁵ The regular mode of examining into the character of the person in question, is to ask the witness whether he knows his general reputation among his neighbours,—what that reputation is,—and whether, from such knowledge, he would believe him upon his oath.⁶ The propriety of this last question, although upheld in England, and sustained by no inconsiderable weight of authority in the United States,⁷ has been questioned by several of the American judges; and it seems that, in some at least of the American courts, a witness will not be permitted to state his own opinion that another witness is not worthy of belief.⁸

¹ As to what are material, see ante, § 316, et seq. and § 1434, et seq.

² Ante, §§ 1426, 1445, 1446.

³ See ante, § 349, et seq.

⁴ B. N. P. 296, 297; R. v. Rookwood, 13 How. St. Tr. 210, per Trevor, Att.-Gen., argu.; R. v. Laver, 16 How. St. Tr. 285, per Pratt, C. J. See Carlos v. Brook, 10 Ves. 49; Penny v. Watts, 2 De Gex & Sm, 501, 527, 528.

⁵ R. v. Rookwood, 13 How. St. Tr. 211, per Ld. Holt.

⁶ R. v. Brown, 36 L. J., M. C. 59; 1 Law Rep., C. C. 70, S. C.; R. v. Watson, 32 How. St. Tr. 495, 496; R. v. De la Motte, 21 How. St. Tr. 811, per Buller, J.; Mawson v. Hartsink, 4 Esp. 103, 104, per Ld. Ellenborough; The People v. Mather, 4 Wend. 257, 258; The State v. Boswell, 2 Dev. 209, 211; Anon., 1 Hill, S. Car. R. 258.

⁷ Cases cited in last note. See ante, § 350.

⁸ Gass v. Stinson, 2 Sumn. 610, per Story, J.; Kimmel v. Kimmel, 3 Serg. & R. 336—338; Wike v. Lightner, 11 Serg. & R. 198; Swift, Ev. 143; Phillips v. Kingfield, 1 Applet. 375. In this last case, the subject was ably examined by Shepley, J., who observed:—"The opinions of a witness are not legal testimony except in special cases; such, for example, as experts in

§ 1471. Whether the inquiry into the general character of a witness shall be restricted to his reputation for veracity, or may be made in general terms, *involving his entire moral character* and estimation in society, is a point not yet definitely settled. Still, when it is considered how intimate is the connexion between one crime and another, and moreover, how difficult it may be to find a witness, who can, in strictness, testify as to the character of another for veracity, though that other may, in the language of Sir Charles Wetherell, have been notoriously “guilty of crimes under every letter of the alphabet,”¹ and be consequently undeserving of the slightest credit,—it certainly appears reasonable that the question as to reputation should be put in the most general form, the opposite party being at liberty to inquire whether, notwithstanding the bad character of the witness in other respects, he has not preserved his reputation for truth. Indeed, one or two English authorities seem to sanction this course;² and although a stricter rule is said to prevail in some of the United States, in others, as for instance, in North and South Carolina, and in Kentucky, the general range of inquiry which is here recommended, is distinctly allowed.³

some profession or art, those of the witnesses to a will, and in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely on any such opinion instead of exercising their own judgment, taking into consideration the whole testimony. To permit the opinion of a witness, that another witness should not be believed, to be received and acted on by a jury, is to allow the prejudices, passions and feelings of the witness, to form, in part at least, the elements of their judgment. To authorise the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it. It moreover would permit the introduction and indulgence in courts of justice of personal and party hostilities, and of every unworthy motive by which man can be actuated, to form the basis of an opinion to be expressed to a jury to influence their decision.” p. 379. But *quære*, whether a witness to impeach reputation may not be asked, in cross-examination, if he would not believe the principal witness on oath.

¹ R. v. Watson, 13 How. St. Tr. 458.

² R. v. Rookwood, 13 How. St. Tr. 211; Carpenter v. Wall, 11 A. & E. 803; *Ld. Stafford's case*, 7 How. St. Tr. 1459, 1478; Sharp v. Scoging, Holt, N. P. R. 541, per Gibbs, C. J.

³ Anon., 1 Hill, 251, 258, 259; The State v. Boswell, 2 Dev. 209, 210; (4128)

§ 1472.¹ It is not, however, enough that the impeaching witness § 1326 should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only which constitutes his general reputation.² And, in ordinary cases, the witness should himself come from the neighbourhood of the individual whose character is in question; for if he be a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries.³

§ 1473. Where the general reputation of a witness has been § 1327 thus impeached, the party calling him may *re-establish his credit*,

Hume v. Scott, 3 A. K. Marsh. 261, 262. In this last case, Mills, J., makes the following observations:—"Every person, conversant with human nature, must be sensible of the kindred nature of the vices to which it is addicted. So true is this, that, to ascertain the existence of one vice of a particular character, is frequently to prove the existence of more at the same time, in the same individual. Add to this, that the persons of infamous character may and do frequently exist, who have formed no character as to their lack of truth; and society may have never had the opportunity of ascertaining, that they are false in their words or oaths. At the same time they may be so notoriously guilty of acting falsehood, in frauds, forgeries, and other crimes, as would leave no doubt of their being capable of speaking and swearing it, especially as they may frequently depose falsehood with greater security against detection, than practise those other vices. In such cases, and with such characters, ought the jury to be precluded from drawing inferences unfavourable to their truth as witnesses by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held by the society or neighbourhood where he is conversant, his word and his oath is estimated. If that is free from imputation, his testimony weighs well. If it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the jury with a full knowledge of the standing of a witness, into whose character an inquiry is made. It will not thence follow, that from minor vices they will draw the conclusion, in every instance, that his oath must be discredited, but only be put on their guard to scrutinise his statements more strictly; while in cases of vile reputation in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book as to fix upon him the reputation of a liar, when on oath."

¹ Gr. Ev. § 461, in part.

² Boynton v. Kellogg, 3 Mass. 192, per Parsons, C. J.; Wike v. Lightner, 11 Serg. & R. 198—200; Kimmel v. Kimmel, 3 Serg. & R. 337, 338.

³ Mawson v. Hartsink, 4 Esp. 103, per Ld. Ellenborough; Douglass v. Tousey, 2 Wend. 352.

by cross-examining the witnesses, who have spoken against him, as to their means of knowledge and the grounds of their opinion,¹ or as to their hostile feelings towards the person whose testimony they have discredited,² or as to their own character and conduct, or by calling other witnesses, either to support the character of the first witness,³ or to attack in their turn the general reputation of the impeaching witnesses.⁴ How far this plan of recrimination may be carried, is not yet formally determined; though the practice is said by some lawyers to be in conformity with the doggerel rule of the civil law,

In testem testes, et in hos, sed non datur ultra;

that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses can be called to attack the characters of these last.⁵

§ 1474.⁶ After a witness has been cross-examined, the party who § 1328 called him has a *right to re-examine him*,⁷ and to ask all questions which may be proper to draw forth an *explanation* of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive, or provocation, which induced the witness to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.⁸ This point, after having been much discussed in the Queen's case, was again brought before the court several years subsequently, when the learned judges held it to be settled law, that proof, on cross-examination, of a

¹ Mawson v. Hartsink, 4 Esp. 103, 104.

² Long v. Lamkin, 9 Cush. 361, 365.

³ R. v. Murphy, 19 How. St. Tr. 724, 725.

⁴ 2 Ph. Ev. 432.

⁵ Lord Stafford's trial, 7 How. St. Tr. 1484.

⁶ Gr. Ev. § 467, in great part.

⁷ "The Chancery, Ireland, Act, 1867," 30 & 31 V., c. 44. attempts to guard against legal procrastination by enacting, in § 101, that "the re-examination of a witness shall in all cases follow his cross-examination, and shall not, except by consent or special order of the court, be delayed to a future time."

⁸ Such was the opinion of seven out of eight judges in the Queen's case, as delivered by Ld. Tenterden, 2 B. & B. 297; R. v. St. George, 9 C. & P. 488, per Parke, B.

detached statement made by or to a witness at a former time, does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved.¹ Therefore, where a witness has been cross-examined as to what the plaintiff had said in a particular conversation, it was held that he could not be re-examined as to other assertions, made by the plaintiff in the same conversation, that were not connected with the assertions to which the cross-examination related, although they were connected with the subject-matter of the suit.² But if a witness admits on cross-examination, that he has formerly made statements inconsistent with his present testimony, or if that fact be proved by independent evidence, the witness may be asked, on re-examination, to explain his motives for making such inconsistent statements.³

§ 1475.⁴ If the counsel chooses to cross-examine the witness as to *facts which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given. Thus, where issue was joined upon a plea of prescription to a declaration for trespass in G., and the plaintiff's witnesses were asked, in cross-examination, questions respecting the user in other places than G., which they proved; it was held that the plaintiff, in re-examination, might show an interruption in the user in such other places.⁵ But an adverse witness will not be permitted to obtrude such irrelevant matter in answer to a question not relating to it; and if he should do so, the party cross-examining may apply to have the answer struck out of the judge's notes, after which the witness cannot be re-examined on the subject.⁶ If, however, the cross-examining counsel omit to take this course, the re-examination will be allowed.⁷ § 1329

¹ *Prince v. Samo*, 7 A. & E. 627; 3 N. & P. 139, S. C.; recognised in *Sturge v. Buchanan*, 10 A. & E. 605.

² *Prince v. Samo*, 7 A. & E. 627. In this case, the opinion of Ld. Tenterden, in the Queen's case, 2 B. & B. 298, that evidence of the whole conversation, if connected with the suit, was admissible, though it related to matters not touched in the cross-examination, was considered and overruled.

³ *R. v. Woods*, 1 Crawf. & D., C. C. 439, per Burton, J.

⁴ Gr. Ev. § 468, almost verbatim.

⁵ *Blewett v. Tregonning*, 3 A. & E. 554; 5 N. & M. 308, S. C.

⁶ *Id.* 3 A. & E. 554, 565, 581, 584.

⁷ *Id.*

§ 1476.¹ Where evidence of contradictory statements, or of other improper conduct on the part of a witness, has been either elicited from him on cross-examination, or obtained from other witnesses, with the view of impeaching his veracity,—his *general character* for truth being thus, in some sort, *put in issue*,—it has been deemed reasonable to admit general evidence, that he is a man of strict integrity and scrupulous regard for truth.² But evidence that he has on other occasions made statements similar to what he has testified in the cause, is not admissible,³ unless he be charged with a design to misrepresent, in consequence of his relation to the party, or to the cause; in which case it may be proper to show, that he has made a similar statement before that relation existed.⁴ So, if the character of a deceased attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general good character is admissible.⁵ But mere contradiction among witnesses examined in court supplies no ground for admitting general evidence as to their character;⁶ though if fraud, or other improper conduct, be imputed to any of them, such evidence will then be received.⁷ § 1330

§ 1477. The judge has always a discretionary power, with which the court above is very unwilling to interfere,⁸ of *recalling witnesses* at any stage of the trial, and of putting such legal questions to them as the exigencies of justice require.⁹ He will seldom, how- § 1331

¹ Gr. Ev. § 469, almost verbatim.

² R. v. Clarke, 2 Stark. R. 241; Annesley v. Ld. Anglesea, 17 How. St. Tr. 1348.

³ B. N. P. 294; R. v. Parker, 3 Doug. 242, 244, per Buller, J.; Anon., per Eyre, C. J., cited 2 Ph. Ev. 445; Berkeley Peer., per Ld. Redesdale, cited id. These cases overrule Lutterell v. Reynell, 1 Mod. 283.

⁴ 2 Ph. Ev. 446; 2 Poth., Obl. 251.

⁵ Doe v. Stephenson, 3 Esp. 284; 4 Esp. 50, S. C., cited and approved by Ld. Ellenborough in the Bp. of Durham v. Beaumont, 1 Camp. 207—210, and in Provis v. Reed, 5 Bing. 435; 3 M. & P. 4, S. C.; Doe v. Wood, cited by Burrough, J., 5 Bing. 439.

⁶ Bp. of Durham v. Beaumont, 1 Camp. 207.

⁷ Annesley v. Ld. Anglesea, 17 How. St. Tr. 1348.

⁸ Middleton v. Barned, 4 Ex. R. 243, per Parke, B.

⁹ R. v. Watson, 6 C. & P. 653. The same law prevails in Scotland, for the Act of 15 & 16 V., c. 27, § 4, expressly enacts, that “it shall be competent to the presiding judge or other person before whom any trial or proof shall

ever, except under special circumstances, permit a plaintiff, after his case is closed, to recall a witness to prove a material fact;¹ though the application will in general be entertained, if made before the closing of the plaintiff's case.² So, if it be discovered, after a witness has been cross-examined, that his testimony at the trial relative to the subject-matter of the cause differs from some other statement formerly made by him, the court will allow him to be recalled if still within reach, and to be further cross-examined in order to lay a foundation for impeaching his credit by producing witnesses to contradict him.³ If, however, the witness cannot be found, the proof of the other statements must be rejected.⁴ If a question has been omitted in the examination in chief, and cannot, in strictness, be asked on re-examination as not arising out of the cross-examination, it is usual for the counsel to request the judge to make inquiry; and such a request is generally granted.⁵

§ 1478. In former times, when the evidence of witnesses called on opposite sides was directly conflicting, the court would often direct that the witnesses should be *confronted*; and on one remarkable occasion, no less than four witnesses were for this purpose placed together in the box.⁶ This practice,—which is still recognised in the Ecclesiastical Courts and in the Probate Division of the High Court,⁷ and which prevails largely in the County Courts, where it is often productive of highly useful results,—has, for some unexplained reason, grown into comparative disuse at Nisi Prius. This is to be regretted; for the practice certainly affords an excellent opportunity of contrasting the demeanour of the op- § 1332

proceed, on the motion of either party, to permit any witness, who shall have been examined in the course of such trial or proof, to be recalled."

¹ *Murray v. Sheriffs of Dublin*, Arm. M. & O. 130, per Brady, C. B.; *Johnston v. Clinton*, id. 123, per id.; *Kelly v. Smith*, id. 150, per Crampton, J.; *Bell v. Stewart*, id. 401, per Brady, C. B. See *Bevan v. M'Mahon*, 2 Swab. & Trist. 55.

² *White v. Smith*, Arm. M. & O. 171, per Brady, C. B.; *Casson v. O'Brien*, id. 263, per Pennefather, C. J.

³ *The Queen's case*, 2 B. & B. 312, 313.

⁴ *Id.*

⁵ 2 Ph. Ev. 408.

⁶ *Annesley v. Ld. Anglesea*, 17 How. St. Tr. 1350.

⁷ *Enticknap v. Rice*, 34 L. J., Pr. & Mat. 110; 4 Swab. & Trist. 136, S. C.

posing witnesses, and of thus testing the credit due to each; while it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth.¹

¹ Mr. Justice Cowen, in his note to Ph. Ev., vol. ii., p. 774, illustrates the utility of this practice by a case, "in which a highly respectable witness, sought to be impeached through an out-of-door conversation, by another witness, who seemed very willing to bring him into a contradiction, upon both being placed upon the stand, furnished such a distinction to the latter as corrected his memory, and led him in half a minute to acknowledge that he was wrong. The difference lay only in one word. The first witness had now sworn that he did not rely on a certain firm as being in good credit. It turned out that, in his former conversation, he spoke of a partnership, from which one name was soon afterwards withdrawn, leaving him now to speak of the latter firm thus weakened by the withdrawal. In regard to the credit of the first firm, he had, in truth, been fully informed by letters. With respect to the last, he had no information. The sound in the title of the two firms was so nearly alike, that the ear would easily confound them; and had it not been for the colloquium thus brought on, an apparent contradiction would, doubtless, have been kept on foot, for various purposes, through a long trial. It involved an inquiry into a credit, which had been given to another on the fraudulent representations of the defendant."

A TREATISE
ON THE
LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH

ILLUSTRATIONS FROM AMERICAN AND OTHER FOREIGN
LAWS.

From the Eighth English Edition.

BY

HIS HONOUR JUDGE PITT TAYLOR.

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CHAPTER IV.

PUBLIC DOCUMENTS.

§ 1479.¹ WRITINGS are divisible into two classes, PUBLIC and § 1333 PRIVATE. The former consists of the acts of public functionaries, in the *Executive, Legislative, and Judicial* Departments of Government; including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To the same class may be referred foreign acts of State, and the judgments of foreign courts. In the present chapter it is proposed to treat of all such public documents; and the inquiry will be directed first, to the MEANS OF OBTAINING AN INSPECTION OR COPY of them; secondly, to the METHOD OF PROVING them; and thirdly, to their ADMISSIBILITY AND EFFECT.

§ 1480. In former times it seems to have been considered § 1334 necessary to obtain the sanction of the Attorney-General, in order to entitle any private person to inspect, or take copies of, the *general records of the realm*.² At the commencement, however, of the present reign a better system was established, and most of these invaluable documents were placed under the charge and superintendence of the Master of the Rolls. The statute³ by which this alteration was effected, contains no section directly entitling the public to inspect these documents, or declaring whether they have any, or what remedy, in the event of their being refused access to them; but it states in the preamble, that

¹ Gr. Ev. § 470. in great part.

² *Legatt v. Tollervy*, 14 East, 306, per Ld. Ellenborough; *Doe v. Date*, 3 Q. B. 619, per Williams, J.

³ 1 & 2 V., c. 94. See, also, "The Public Records, Ireland, Act, 1867," 30 & 31 V., c. 70, Ir.

“it is expedient to establish one Record Office and a better custody, and to allow the free use of any public records, as far as stands with their safety and integrity, and with the public policy of the realm.” It then empowers the Master of the Rolls to make rules “for the admission of such persons as ought to be admitted to the use of such records,” and “to fix the amount of fees, if any, to be paid for such use;¹ and it proceeds to authorise either his Honour, or the Deputy-Keeper of the Records, to allow copies to be made of any of the documents “at the request and cost of any person desirous of procuring the same.”² In exercise of the powers thus vested in him, the late Lord Langdale directed,³ that all the public record offices should be open daily, excepting on Sundays and a few holidays,⁴—he prescribed a reasonable scale of fees,⁵ which were not chargeable at all to “*literary inquirers*,”⁶—and he instructed the assistant-keepers to give to all applicants every information and assistance in their power, not merely from the calendars and indexes, but also from their own knowledge of records.⁷

§ 1481. Indeed, his Honour took from the first a truly enlightened view of the privileges of the public as connected with these documents; and, in a letter which he wrote to the Premier shortly after the passing of the Act, he thus expressed his sentiments:—“The Records have justly been called the *Muniments of the Kingdom and the People's Evidences*; and they ought to be kept and managed under such arrangements, as may afford to the public the greatest facility of using them that is consistent with their safety. The public ought to have access to them for the purpose of easily obtaining information upon the subjects to which the records relate, and ought to be enabled easily to obtain authentic copies of all documents, which can be adduced as evi- § 1335

¹ 1 & 2 V., c. 94, § 9; 30 & 31 V., c. 70, § 17, Ir.

² 1 & 2 V., c. 94, § 12; 30 & 31 V., c. 70, § 19, Ir.

³ In 11 Beav. xxii. et seq., the rules are set out at length.

⁴ 2nd Rep. of Dep.-Keeper of Pub. Rec. i., Append. p. 14.

⁵ Id., p. 15.

⁶ Letter of Lords of the Treasury, dated 17th Nov., 1851.

⁷ 2nd Rep. of Dep.-Keeper of Pub. Rec. i., App. p. 15.

dence in the establishment or defence of rights, which are at issue in the course of judicial or Parliamentary proceedings.”¹

§ 1482. Lord Romilly, when Master of the Rolls, exhibited, § 1335A
like his predecessor, a liberal intelligence in the management of the Record Office; and in 1866, on the opening of the New Search Rooms,² he took the wise step of abolishing all fees whatever for searches and inspections, permitting each searcher to take notes, or even examined copies, of any records, gratis,³ and retaining only moderate fees for the furnishing of authenticated copies, of documents, or for the attendance of clerks as witnesses.⁴

§ 1483. Although, at the present day, the question whether the § 1336
public have a strict legal right to inspect these records, is not likely to be mooted, it would be difficult to establish the right, *except* as to such of the documents as are the *records of the superior courts* of law or equity; and even with respect to these, it may be doubtful whether the Queen’s Bench Division of the High Court would interfere by mandamus, unless, the applicant was prepared to

¹ Dated 7 Jan., 1839, and cited 1st Rep. of Dep.-Keep. of Pub. Rec. App. 67.

² These are open every day, except Sunday, Christmas Day to New Year’s Day inclusive, Good Friday and the Saturday following, Easter Monday and Tuesday, Whit Monday and Tuesday, Her Majesty’s Birthday, 24th May, and Coronation Day, 28th June, and days appointed for public fasts or thanksgivings. The hours of attendance are from 10 till 4 o’clock, except on Saturday when the rooms close at 2. See 28th Rep. of Dep.-Keep. of Pub. Rec. p. iv.

³ “A searcher may take notes, or a full copy of any record, and examine the same with the record with his own agent; but no officer shall examine, correct, or certify such copy or extracts. Tracings are not allowed without permission.” 28th Rep. of Dep.-Keep. of Pub. Rec. p. iv.

⁴ The table of fees is as follows:—

	£	s.	d.
For authenticated copies, per fol. of 72 words :			
Docum. to the end of reign of Geo. 2	0	1	0
Docum. after reign of Geo. 2	0	0	6
For attend. at either H. of Parl. to be sworn	1	1	0
Do. do. or elsewhere to give evid.; or with			
10 records or less number, each day	2	2	0
Do. do. for each additional record, each day	0	2	0
For attend. on Master of the Rolls on a Vacatur	1	1	0
Do. to receive mortgage-money	0	5	0
On payment of mortgage-money	0	10	6

28th Rep. of Dep.-Keep. of Pub. Rec. App. 2.

show that he was interested in the document which he sought to inspect.¹ Indeed, it may be laid down with tolerable safety, as a rule applicable alike to the general records of the realm and to all other writings of a public nature, that, if the disclosure of their contents would, in the opinion of the court, or of the chief executive magistrate, or of the head of the department under whose control they may be kept, be injurious to the public interests, an inspection would not be granted.²

§ 1484. As one of the principal objects contemplated by the Legislature in passing the Act of 1 & 2 V., c. 94, was the establishment of a general *Record Office*, in lieu of the many repositories which previously existed, a building has been erected on the Rolls' Estate in Fetter-lane, which is applied to that desirable purpose.³ To this building all the records, which were formerly deposited in the Tower of London, the Carlton Ride, and the Chapter House at Westminster, and many of those which used to be kept in the Rolls House and Chapel, and in the State Paper Office,⁴ have at length been removed. The Tower which adjoins the Chapter House at Westminster, and which was formerly the prison of the Monastery there, is still, however, the repository for all original Acts of Parliament. § 1337

§ 1485. Among the records now under the custody of the Master of the Rolls, may be enumerated the following:⁵—All the records of the superior courts of common law or equity, which are more than *twenty* years old; the deeds, books, documents, and papers belonging to the suitors in Chancery, which were formerly under the custody of the Masters of that court, and deposited in Southampton Buildings, which were next placed under the special care of the Clerk of Records and Writs,⁶ and which § 1338

¹ See *R. v. Staffordshire Js.*, 6 A. & E. 99, 100, per *Ld. Denman*.

² *Ante*, §§ 939, 947.

³ The Public Record Office for Ireland is in Dublin, near the Four Courts.

⁴ Some of the State Papers of the last half century are deposited in two houses in Whitehall-yard.

⁵ For an enumeration of the Public Records in Ireland, see 30 & 31 V., c. 70, § 4, *Ir.*

⁶ 23 & 24 V., c. 149, § 9; *Gen. Ord. in Ch.*, 22nd May 1866. This office was abolished in 1879, by 42 & 43 V., c. 78, *Sched. I.*

are now in the charge of the Master of the Supreme Court, and deposited in the Filing and Record Department of the Central Office;¹ the records, muniments, and writings of the Marshalsea, Palace, and Peveril Courts, which were abolished in 1849;² the records late in the custody of the Queen's Remembrancer, including those of the abolished offices of the Pipe, the Lord Treasurer's Remembrancer, the foreign Apposer, the Clerk of the Estreats, the Surveyor of Green Wax, and the Clerk of the Nichils: the records of the Land Revenue Record Office, the Lord Chamberlain's Office, the Augmentation Office, the King's Silver Office, the Alienation Office, and the Chirographer's Office; records of the Admiralty Courts; the log-books of the navy; various branches of the correspondence and documents of the Admiralty and Navy Boards; many of the papers of the War Office; the charity commission papers; various records of forfeited estates; the French claim commission papers; duplicates of land and assessed taxes; population returns; some records relating to the land revenue;³ many of the equity records of the Welsh courts; the fines and recoveries, and other records of the Chester circuit; the records of the Court of Wards and Liveries; some of the proceedings in the Star Chamber and the Court of Chivalry; the placita forestæ; the Pell records; the records of first fruits and tenths; Domesday Book; Parliament rolls; statute rolls; patent rolls; close rolls; some of the surveys of land which formerly belonged to the Crown; lieger-books and chartularies of the dissolved monasteries, priories, &c.; and some very valuable Home, Foreign, Colonial, and Treasury Papers.⁴ The legal reader will observe

¹ Rules of Sup. Ct. 1883, Ord. LX., R. 3; Ord. LXI., R. 1.

² 12 & 13 V., c. 101, §§ 14, 16.

³ As to the remainder, see post, § 1486.

⁴ This list is compiled from the annual reports of the Dep.-Keeper of the public records, and, although not offered as anything like a complete list, it is believed to be accurate so far as it goes. Besides the documents enumerated above, there are, at the Record Office, a vast quantity of curious miscellaneous manuscripts, minute books, indices, calendars, &c., which were either collected by the late Record Commiss., or by persons employed in the Rec. Office, together with many important transcripts from the royal or public archives of France, Normandy, Belgium, Saxony, Prussia, Bavaria, Ham-burgh, Portugal, Switzerland, and Italy. But all these are merely deposited for convenience with the M. R., and are not in official custody under the Act.

that very many of the documents here alluded to are not strictly records; but this circumstance is rendered immaterial by the Act of 1 & 2 V., c. 94, which provides that the word "records" in that Act shall be taken to mean all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature, belonging to her Majesty, or, on the 14th of August, 1838, deposited in any of the offices or places of custody in the Act mentioned.¹

§ 1486. In addition to the records, which are now placed under the control of the Master of the Rolls, there are many *other documents of a public character* the custody of which belongs to particular courts and offices. Among these may be enumerated the records of the Duchy of Lancaster, which are at present deposited in Lancaster-place, adjoining Waterloo-bridge; the records of the Duchy of Cornwall, the repository for which is at Buckingham-gate; the records of the Heralds' College,² most of which will be found either in the College itself at St. Bennet's-hill, St. Paul's or in the Harleian Library; some of the land revenue records, which parties interested may inspect at the "Office of land revenue records and inrolments" in Spring Gardens;³ the records of baptisms, marriages, and burials in India,⁴ which are deposited in Charles-street, St. James's-park, at the office of the Secretary of State for India in Council; and the registers of births, baptisms, marriages, and burials of British subjects beyond seas, which have been transmitted from different British embassies and factories on the continent of Europe and elsewhere,

§ 1339

¹ See §§ 20, and 1 & 2. See, also, 30 & 31 V., c. 70, §§ 3, 5, Ir.; and 38 & 39 V., c. 59, Ir. Under this last Act many parochial records have been transferred to the Irish Record Office.

² As to these, see Hubb. Ev. of Suc. 538—566.

³ See 2 W. 4, c. 1, §§ 15, 20, 22. Many of these records are in the Record Office, ante, § 1485. The audited accounts of the Commiss. of Woods and Forests are now deposited as of record in the Land Revenue Office, 7 & 8 V., c. 89.

⁴ In Bengal, from 1713 to 1737; at Madras, from 1698 to 1834; in Bombay, from 1709 to 1837; and at St. Helena, from 1767 to 1835. See p. 13 of Rep. of Commiss., appointed to make inquiries respecting non-parochial registers, published 1838.

and which are now placed in the registry of the Consistory Court of London.¹

§ 1487. The Act which, in 1857, established the Court of Pro- § 1339A
bate,—now transmuted into the Probate Division of the High Court,—contains several important provisions with respect to the custody and inspection of original wills, and the inspection of the calendars of the grants of probate and administration. In the first place, all persons who heretofore either had jurisdiction to grant probate or administration, or had the custody of the papers of any old Court of Probate, are directed, upon receiving a requisition under the seal of the New Court from a registrar, to transmit to the place specified in such requisition, “all [or one or more²] records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, writs, documents, and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be of easy reference, under the control and direction of the Court.”³ The statute next enacts, that “there shall be one place of deposit under the control

¹ “These registers were first received in the registry of the Consist. Court of London, in 1816, and may be divided into three classes:—1. Certificates of baptisms and marriages, bearing the signatures of the parties and witnesses (which, with very few exceptions, is the case) and authenticated by the British envoy or minister, as having been performed in his house, and which have from time to time been sent through the Foreign Office to the registry of the Bp. of London. In this class may be included the registers from Oporto from 1706 to 1802, and the registers from the Cape of Good Hope, Gibraltar, and Geneva. These are the original books, in which the entries are signed by the parties, and authenticated by the chaplains. 2. Transcripts from original registers, certified by the ministers of the different places, in the same manner as the transcripts under the Act of 52 G. 3, c. 146, for the regulation of transcripts deposited with the registrars of the several dioceses. A book of transcripts also from the register kept at the British embassy in Paris, from 1816 to 1833, and continued to the present time; and a transcript of the registers of St. Petersburg from 1706 to the present time. 3. A book of registers, transmitted from Cronstadt, which appear to have been transcribed, but they are not certified as such.”—P. 11 of Rep. of Commiss., cited in late note.

² This amendment was introduced into the Eng. Act by § 27 of 21 & 22 V., c. 95.

³ 20 & 21 V., c. 77, § 89; 20 & 21 V., c. 79, § 96, Ir.

of the Court,"—which place for the present is fixed by order of council at No. 6, Great Knight Rider-street, Doctors' Common,¹—"in which all the original wills brought into the court, or of which probate or administration with the will annexed is granted under this Act in the principal registry thereof, and copies of all wills the original whereof are to be preserved in the district registries, and such other documents as the court may direct, shall be deposited and preserved, and may be inspected, under the control of the court, and subject to the rules and orders under this Act."² Lastly, the judge of the court is directed to cause calendars of the grants of probate and administration to be made and printed from time to time, and copies of these calendars are to be deposited in the district registries, the office of her Majesty's Prerogative in Dublin, the office of the commissary of the county of Midlothian in Edinburgh, and such other offices as the court may order, "and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected."³

§ 1488.⁴ With respect to the *Records of the Queen's Courts*, it § 1340 has been admitted, from a very early period, that the *inspection* and *exemplification* of these documents are the *common right of the public*; and this right was extended by an ancient ordinance or statute⁵ to cases where the subject was concerned against the Crown. That statute, however, was repealed in 1871;⁶ and as the common law on which it was partly founded, simply relates to such records as are required by the subject for the purpose of being given in evidence, a prisoner who is charged either with high treason or felony, is certainly not entitled,—unless he be so by legislative interference,—to a copy of the indictment or of any of the proceedings against him.⁷ In most cases of treason, indeed, the accused must now be supplied, ten clear days before his trial, with a copy of the

¹ See Gazette of 4th Dec., 1857.

² 20 & 21 V., c. 77, § 66; 20 & 21 V., c. 79, § 71, Ir.

³ 20 & 21 V., c. 77, §§ 67, 68. See, also, 20 & 21 V., c. 79, §§ 72, 73, Ir.

⁴ Gr. Ev. § 470, in part, as to first five lines.

⁵ 46 § E. 3.

⁶ St. L. Rev. Act, 1871, 34 & 35 V., c. 116.

⁷ *R. v. Ld. Preston*, 12 How. St. Tr. 658—663; Fost. C. L. 228, 229.

indictment, but this privilege is allowed him in consequence of statutes having been passed for that purpose in the reigns of King William III.¹ and Queen Anne.² Still, in ordinary cases of felony, including that class of treasons which consists in compassing the death or personal injury of the Sovereign,³ the *accused is not*, even at the present day, *entitled to a copy of the indictment*; but all that he can claim as of right is, to have it read slowly to him in open court.⁴ This rule,—which is the very essence of injustice,⁵—fortunately does not *extend to misdemeanors*; the common law, with an inconsistency which admits of no sensible explanation, having vouchsafed to parties liable to fine and imprisonment a privilege, which it refuses to persons on trial for their lives.⁶ With respect to the depositions upon which a prisoner has been committed or held to bail, prepa-

¹ 7 W. 3, c. 3, § 1.

² 7 A., c. 21, § 11, which enacts, that copies of all indictments for high treason and misprision of treason, “shall be delivered to the party indicted ten days before the trial, and in presence of two or more credible witnesses.” This enactment is extended to Ireland by the Act of 17 & 18 V., c. 26. See, also, 5 G. 3, c. 21, § 1, Ir.

³ See 39 & 40 G. 3, c. 93; 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V., c. 51, § 1. See, also, ante, § 958.

⁴ *R. v. Parry*, 7 C. & P. 838, per Bolland, B.; *R. v. Vandercomb*, 2 Lea. 711, 712; *R. v. Cruise*, Ir. Cir. R. 674, per Torrens, J. Though this seems to be the present law in Ireland, it is a curious fact, that in 1641, the Irish judges unanimously resolved that they had no power by law to refuse to give to the accused a copy of the indictment; and the Irish House of Commons in the same year declared, that judges ought not to deny copies of indictments to parties indicted. See an able note on this subject in Ir. Cir. R. 375—378. See, also, *Bothe's case*, M. 666.

⁵ Mr. Chitty observes on this subject, “It is a remarkable circumstance that the English law should allow so much nicety to prevail with respect to formal defects in the indictment, and yet afford the defendant so little opportunity of discovering them.” 1 Chit. Cr. L. 403. The flagrant absurdity of the one rule caused the as flagrant injustice of the other.

⁶ *Lady Fulwood's case*, Cro. Car. 483; 1 Chit. Cr. L. 404. The Act of 60 G. 3 & 1 G. 4, c. 4, § 8, enacts, apparently, pro majori cautela, that “in all cases of prosecutions for misdemeanors, instituted by the Att. or Sol.-Gen. in the [Queen's Bench Div. of the High Court, or at any session of the peace, session of oyer and terminer, great session or session of gaol delivery, in Eng. or Irel.], the court shall, if required, make order that a copy of the information or indictment shall be delivered after appearance to the party prosecuted, or his [solicitor], upon application made for the same, free from all expense to the party so applying; provided that such party, or his [solicitor], shall not have previously received a copy thereof.” See, also, 7 & 8 G. 4, c. 53, 42.

ratory to his being tried for some indictable crime,¹ he is now entitled by statute, not only to inspect them at the trial without fee,² but also to obtain copies of them on payment of a small sum, whatever be the nature of the offence imputed.³

§ 1489. It has been doubted whether a person *tried for felony* § 1341 *and acquitted is entitled to a copy of the record* of his acquittal, for the purpose of giving it in evidence in an action for *malicious prosecution*.⁴ This doubt has arisen in consequence of an order made

¹ A person who has been committed for want of sureties to keep the peace cannot demand a copy of the examinations on which the commitment proceeded; *Ex p. Humphrys*, 19 L. J., M. C. 189; 1 L. M. & P. 323, S. C. nom. *R. v. Herefordshire Js.*

² 6 & 7 W. 4, c. 114, § 4, enacts, that, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

³ 11 & 12 V., c. 42, § 27, enacts, that "at any time *after* the examinations aforesaid shall have been completed, and *before* the first day of the assizes or sessions, or other first sitting of the court, at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words." See, also, 22 V., c. 33, § 3, which enacts, that "at any time after all the depositions of witnesses shall have been taken, every person against whom any coroner's jury may have found a verdict of manslaughter shall be entitled to have, from the person having custody thereof, copies of the depositions on which such verdict shall have been found, on payment of a reasonable sum for the same, not exceeding the rate of three halfpence for every folio of ninety words." Why this privilege is confined to persons charged with manslaughter, it is not very easy to explain. The Irish law is regulated by § 14 of 14 & 15 V., c. 93, which enacts, that "at any time after the examinations in any proceedings for an indictable offence shall have been completed, and on or before the first day of the assizes or sessions, or other first sitting of the court at which any person committed to gaol or admitted to bail is to be tried, such person may require and shall be entitled to receive from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed (or copies of depositions taken at any inquest in case of murder or manslaughter), on payment of a reasonable sum for the same, not exceeding a sum at the rate of three halfpence for each folio of ninety words." See, also, 44 & 45 V., c. 35, § 9, Ir.

⁴ *Browne v. Cumming*, 10 B. & C. 70. See *R. v. Dunne*, Ir. Cir. R. 407, where a prisoner having been convicted, the court refused to allow him a copy of the depositions of a Crown witness, for the purpose of assigning perjury upon them.

by five judges in the reign of Charles II., for the regulation of the Sessions at the Old Bailey; and which directs, that “no copies of any indictment for felony be given without special order upon motion made in open court, at the general gaol delivery upon motion;¹ for the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the King upon just occasions.”² Now, it is certainly difficult, if not impossible, to establish the legality of this order; for not only does it appear to be directly at variance with the Act of 46 Edward III.,—which, as stated just now in § 1488, was then in force,—but it seems also to be wholly inconsistent with the provisions of Magna Charta, “nulli negabimus vel differemus justitiam.” Accordingly, in the case of a prosecution for robbery, evidently vexatious, where the prisoner, after his acquittal, applied to Chief Justice Willes for a copy of the indictment, his lordship refused to make an order on the subject, on the ground that none was necessary; declaring that by the laws of this realm, every prisoner, upon his acquittal, had an undoubted right to a copy of the record of such acquittal, for any use he might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out.³

§ 1490. This statement of the law would seem to be substantially correct, and if so, the order of the judges, confirmed though it be by a decision of Lord Holt,⁴ is illegal; but, be this as it may, thus much may be safely affirmed; first, that the order does not extend to misdemeanors, but that in such cases the prisoner has an absolute right to a copy of the indictment on which he has been either acquitted or convicted;⁵ secondly, that even in cases of felony, where the party acquitted brings an action for malicious

§ 1342

¹ Sic.

² 7th Res., cited in Kel. 3. The five judges were Hyde, C. J., O. Bridge-man, C. J., Twisden, Tyril, and Kelyng, Js.

³ R. v. Brangan, 1 Lea. 27. See, also, Doe v. Date, 3 Q. B. 619, per Williams, J.

⁴ Groenvelt v. Burrell, 1 Ld. Ray. 253; Carth. 421, S. C

⁵ Morrison v. Kelly, 1 W. Bl. 385, per Ld. Mansfield; Evans v. Phillips, 2 Selw. N. A. 1072, 8th Ed., per Adams, B.

prosecution, the judge at Nisi Prius is bound to receive in evidence a true copy of the indictment, though proved to have been obtained without an order; ¹ and lastly, that for the purpose of pleading *autrefois acquit*, or *autrefois convict*, the prisoner is entitled to have a copy of the former record, whatever be the nature of the accusation; and if the court where he was first tried refuses to grant him one, the Queen's Bench Division of the High Court will enforce his right by *mandamus*.²

§ 1490A. Under the Army Act, 1881, any person tried by court-martial is entitled, on demand, in the case of a general court-martial within seven years, and of any other court-martial within three years, after the confirmation of the sentence, to obtain from the officer having custody of the proceedings a copy of the same, including those with respect to the confirmation, upon payment for the same at the prescribed rate, not exceeding twopence for every seventy-two words.

§ 1491. Independent of the general law which governs the right § 1342A to inspect and take copies of the records of courts of justice, the Bankruptcy Act⁴ and Rules of 1883 contain several special regulations on the subject. Thus, R. 10, after declaring that "all proceedings of the court shall remain of record in the court," goes on to provide, that "they may at all reasonable times be inspected by the trustee, the bankrupt, and any creditor who has proved, or *any person* on their behalf." R. 14 next provides, that, "all office copies of petitions, proceedings, affidavits, books, papers, and writings, or any parts thereof, required by any trustee, or by any debtor, or by any creditor, or by the *solicitor* of any such person, shall be provided by the Registrar," without any unnecessary delay, and in the order in which they shall have been be-spoken. Then comes § 16, subs. 4, of the Act, which authorises any person, stating himself in *writing* to be a creditor, at all reasonable times,

¹ *Legatt v. Tollervay*, 14 East, 302; *Jordan v. Lewis*, id. 305, n.; 2 Str. 1122, S. C.

² *R. v. Middlesex Js., In re Bowman*, 5 B. & Ad. 1113.

³ 44 & 45 V., c. 58, § 124.

⁴ 46 & 47 V., c. 52.

portant of these rules are contained in Order LXI. R. 17 provides, that "proper indexes or calendars to the files or bundles of all documents filed at the Central Office shall be kept, so that the same may be conveniently referred to when required; and such *indexes*

SCHEME—*continued*.

Name of Department.	Business.
1. Writ, appearance, and judgment (<i>continued</i>).	The receipt and filing of pleadings and notices delivered on entry of judgment. The transaction of all business heretofore conducted in the Record and Writ office, except such part thereof as is transacted in the Record Department.
2. Summons and Order . . .	The issue of summonses in the Queen's Bench Division, and the drawing up of all orders made either in court or in chambers in that division.
3. Filing and Record . . .	The filing of all affidavits to be filed in the Central Office, and all depositions to be used in the Chancery Division, and such other documents as may from time to time be directed by the Masters to be filed, and the making and examination of office copies of documents filed in the department. The custody of all deeds and documents ordered to be left with the Masters. The business heretofore preformed in the Report Office under the direction and control of the Clerks of Records and Writs.
4. Taxing	The taxation of costs in the Queen's Bench Division, except such costs as have heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office.
5. Enrolment	The business heretofore performed in the Enrolment Office
6. Judgments and married women's acknowledgments	The registry of judgment, execution, &c., and the registry of acknowledgments of deeds by married women.
7. Bills of Sale	The registry of bills of sale and other duties connected therewith.
8. Queen's Remembrancer	The business heretofore performed in the Queen's Remembrancer's Office.
9. Crown Office	The business heretofore performed in the Crown Office.
10. Associates	The business heretofore performed in the Associates' Offices."

or calendars and documents shall, at all times during office hours, be accessible to the public on payment of the usual fee."

R. 18 provides, that "there shall also be entered in proper books kept for the purpose the time when any certificate is delivered at the Central Office to be filed, with the name of the cause and the date of the certificate; and the like entry shall be made of the time of delivery of every other document filed at the Central office; and such books shall, at all times during office hours, be accessible to the public on payment of the usual fee."

Then comes R. 23, which provides, that "the Clerk of Enrolments and each of the following Registrars, namely—

(a.) The Registrar of Bills of Sale;¹

(b.) The Registrar of Certificates of Acknowledgments of Deeds by Married Women;

(c.) The Registrar of Judgments;

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search.

R. 24 states, that "for the purpose of enabling all persons to obtain precise information as to the state of any cause or matter, and to take the means of preventing improper delay in the progress thereof, the proper officer shall, at the request of any person, whether a party or not to the cause or matter inquired after, but on payment of the usual fee, give a certificate specifying therein the dates and general description of the several proceedings which have been taken in such cause or matter in the Central Office."

§ 1491B. Independent of the Rules just cited, every person is entitled by statutory authority to inspect, on payment of a small sum, the warrants of attorney to confess judgment, the *cognovits actionem*, the judge's orders to enter up judgment by consent, and the bills of sale of personal chattels, which must now be filed or registered in the Bills of Sale Department of the Central Office,²

¹ See post, § 1521.

² Ord. LXI., R. 1, cited ante, p. 1279, n. 5.

—the first three classes of documents within twenty one days,¹ the last within seven days,² after their respective execution or making; as also the books and indexes relating to these documents, which the proper officer of the Central Office is directed to keep.³ When a bill of sale has been given by a person residing “outside the London bankruptcy district” or whose chattels are outside such district, an abstract of the contents of such bill of sale must be transmitted from the Central Office to the local County Court Registrar, who must file and index the same; and “any person may search, inspect, make extracts from, and obtain copies of, the abstract so registered.”⁴

§ 1491c. Again, all persons are, by statute, at liberty, on payment of one shilling, to search the book, which used to be kept by the Senior Master of the Common Pleas, and which is now in the custody of one of the Masters of the Supreme Court, and kept in the Central Office,⁵ and which contains an alphabetical list of the persons whose real estate is intended to be affected by the judgments, decrees, orders, or rules of the courts, or by orders in lunacy;⁶ as also the “Index to debtors and accountants to the Crown,” which is kept by the same officer.⁷

¹ 3 G. 4, c. 39, §§ 1, 2, 3, 5; 32 & 33 V., c. 62, §§ 26—28.

² 45 & 46 V., c. 43, § 8; 46 V., c. 7, § 8, Ir.

³ 3 G. 4, c. 39, §§ 5, 6; 6 & 7 V., c. 66; 32 & 33 V., c. 62, §§ 26—28, 41 & 42 V., c. 31, § 12; 45 & 46 V., c. 43, § 16. This last sect. enacts, that “any person shall be entitled at all reasonable times to search the register [of bills of sale] on payment of a fee of 1s., or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from, any and every registered bill of sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of 1s. for each bill of sale inspected, and such payment shall be made by a judicature stamp: provided that the said *extracts* shall be *limited* to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars.” See also 46 V., c. 7, § 16, Ir.

⁴ 45 & 46 V., c. 43, § 11; 46 V., c. 7, § 11, Ir. In Ireland the abstract is sent to the local Clerk of the Peace.

⁵ 42 & 43 V., c. 78, §§ 5—8; Ord. LXI., R. 1.

⁶ 1 & 2 V., c. 110, § 19; 2 & 3 V., c. 11, §§ 3, 8; 3 & 4 V., c. 82, § 2; 37 & 38 V., c. 96, Sch. See also 18 & 19 V., c. 15, §§ 2, 3, as to the courts in Counties Palatine.

⁷ 2 & 3 V., c. 11, §§ 8, 9.

§ 1492.¹ It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction;² but it is clear that everyone has a *right to inspect and take copies* of the parts of the proceedings in which he is *individually interested*. The party, therefore, who wishes to examine any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper purpose.³ If his application be refused, the Chancery, or the Queen's Bench, Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction; and the magistrate having refused to give him one, they granted a writ of certiorari, for the mere purpose of procuring a copy, and of thus enabling the defendant to defeat the action.⁴ So, where a party, who had been sued in a court of conscience and had been taken in execution, brought an action of trespass and false imprisonment, the judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself.⁵ § 1343

§ 1493. Indeed, it may be laid down as a general rule, that the Queen's Bench Division will *enforce by mandamus the production of every document of a public nature*, in which any one of her Majesty's subjects can prove himself to be *interested*.⁶ Every officer, therefore, appointed by law to keep records, ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves,—without putting

¹ Gr. Ev. § 473, in some part.

² R. v. Chester, 1 Chit. R. 297, 299, per Abbott, C. J., questioning Herbert v. Ashburner, 1 Wils. 297.

³ See R. v. Wilts. & Berks. Can. Co., 3 A. & E. 47; R. v. Leicester Js., 4 B. & C. 892.

⁴ R. v. Midlam, 3 Burr. 1720—1722.

⁵ Wilson v. Rogers, 2 Str. 1242.

⁶ R. v. Staffordshire Js., 6 A. & E. 99, 100, per Ld. Denman.

them to the expense and trouble of making a formal application for a mandamus.¹ But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, and that the inspection is *bonâ fide* required on some special and public ground,² or the court will not interfere in his favour; and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be directly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced.³ Thus, the rate-payers of a county are not entitled to inspect and copy the bills of charges of county officers, which, having been paid by the treasurer under orders of justices, have become items in his accounts, and which have been allowed by the sessions, and deposited by the clerk of the peace among the county records.⁴ For in such case, the individual rate payers would have no power to interfere, even though they might prove to demonstration that the bills had been improperly paid and allowed.

§ 1494.⁵ Some other books and documents partake *both of a* § 1345
public and private character, and are treated as the one or the other according to the relation in which the applicant stands to them. Thus, a stranger has no right to an inspection of the *rolls of copyhold courts* and of courts baron;⁶ but the *copyhold* tenants of a manor are clearly entitled to inspect and take copies of such parts, though of such parts only,⁷ of the court rolls, as relate to their own titles, privileges, or interests; and this, too, whether an action be pending or not.⁸ Indeed, by a general rule of court,⁹ it is determined, that “an order upon the lord of a manor to allow limited inspection of the court rolls, may be made on the applica-

¹ *R. v. Staffordshire Js.*, 6 A. & E. 99, 100, per *Ld. Denman*.

² *Ex. p. Briggs*, 28 L. J., Q. B. 272; 1 E. & E. 881, S. C.

³ *R. v. Staffordshire Js.*, 6 A. & E. 100, 101, per *Ld. Denman*.

⁴ *Id.* 84; overruling *R. v. Leicester Js.*, 4 B. & C. 891. See, also, *R. v. St. Marylebone*, 5 A. & E. 268.

⁵ *Gr. Ev.* § 474, as to first three lines.

⁶ *Crew v. Sanders*, 2 Str. 1005; *R. v. Shelley*, 3 T. R. 142, per *Buller, J.*

⁷ *R. v. Merch. Tailors' Co.*, 2 B. & Ad. 128, 129, per *Littledale, J.*

⁸ *R. v. Tower*, 4 M. & Sel. 162; *R. v. Lucas*, 10 East, 235.

⁹ *Rules of Sup. Ct.*, 1883, Ord. XXXI., R. 19.

tion of a copyhold tenant, supported by an affidavit that he has applied for inspection, and that the same has been refused." It has been held, that this last rule is not strictly confined to cases where the applicant is a copyhold tenant; but if he has a *prima facie* title to a copyhold,¹ or is otherwise interested in copyhold property,² as, for instance, if he is the devisee of a rent-charge on such property,³ the court will make the order. Even a *freehold* tenant of a manor has a right to inspect the court rolls;⁴ though it may, perhaps, be doubtful, whether he must not first show that some suit is actually depending,⁵

§ 1495. Again, the *books of a corporation* are, at common law,⁶ § 1346 regarded as public to a certain extent with respect to its members, but private with respect to strangers. Thus, on the application of a *member*, the Queen's Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation,⁷ provided it be shown that such inspection is requisite with reference either to an action then instituted, or at least to some specific dispute or question depending, in which the applicant is interested;⁸ but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion.⁹ The rule appears to have been sometimes laid down more broadly, and the language ascribed to the court in one or two cases, would almost lead to the inference, that members of a corporation have an

¹ *R. v. Lucas*, 10 East, 235.

² *Ex p. Hutt*, 7 Dowl. 690, per Coleridge, J.

³ *Ex p. Barnes*, 2 Dowl. N. S. 20, per Wightman, J.

⁴ *Addington v. Clode*, 2 W. Bl. 1030; *Hobson v. Parker*, Barnes, 237, cited by Buller, J., in 3 T. R. 142; *Warwick v. Queen's Coll.*, Oxford, 3 Law Rep., Eq. 683; 36 L. J., Ch. 505, S. C. nom. *Warwick v. Queen's Coll.* But see *Owen v. Wynn*, L. R., 9 Ch. D. 29, per Ct. of App.

⁵ *R. v. Allgood*, 7 T. R. 746. But see *R. v. Lucas*, 10 East, 235, and *R. v. Tower*, 4 M. & Sel. 162.

⁶ As to the Stat. Law, see post, §§ 1504—1507.

⁷ *R. v. Beverly*, 8 Dowl. 140.

⁸ *R. v. Merchant Tailors' Co.*, 2 B. & Ad. 115; In re *Burton and the Saddlers' Co.*, 31 L. J., Q. B. 62.

⁹ *R. v. Merch. Tailors' Co.*, 2 B. & Ad. 115; In re *Burton and the Saddlers' Co.*, 31 L. J., Q. B. 62.

absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body.¹ But this doctrine is now properly exploded; the privilege of inspection being confined to those cases in which the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object.² For instance, where certain members of a corporation applied for a mandamus to the master and wardens to allow them to inspect all the documents of the corporation, alleging their belief that its affairs were improperly conducted, and complaining of misgovernment in some particulars not affecting themselves, nor then in dispute, the court held that the applicants had no right on these speculative grounds to the inspection prayed, and discharged the rule.³ So, where some parties were sued by an incorporated company for alleged misconduct in making false entries in the books of the corporation, while acting in the capacity of directors, the court held that they were not entitled to a general inspection of the company's books, at least without an affidavit that such inspection was necessary for their defence.⁴ In another case, where a shareholder, sued for calls, applied to the court for a rule to inspect the minute-books of the company, and of the meetings of the directors, "particularly with respect to the calls" in question, the application was rejected, as it appeared to have been made for the purpose, not of assisting the defendant to plead a particular plea, but of enabling him to fish out a defence.⁵

§ 1496. The right of inspection which the members of a corporation enjoy being thus limited, it is only just that this right should be still more restricted in the case of *persons who are not members*; and, accordingly, unless the documents sought to be inspected contain the common evidence of some transaction between the corporation and a stranger, or at least furnish the rule by which the stranger is sought to be bound, he has no right to

¹ R. v. Hostmen of Newcastle, 2 Str. 1223; R. v. Babb, 3 T. R. 581, per Ashhurst, J.

² R. v. Merch. Tailors' Co., 2 B. & Ad. 115.

³ Id.

⁴ Imperial Gas Co. v. Clarke, 7 Bing. 95.

⁵ Birming. Brist. & Thames Junc. Ry. Co. v. White, 1 Q. B. 282.

inspect them, even though he be a defendant in a suit brought by the corporation. Thus, if a corporation were to bring an action against a stranger for tolls, the courts could not grant the defendant leave to inspect the corporations muniments.¹ But, if an action were brought against a party residing in a borough, for the breach of a by-law restraining persons, not freeman, from exercising trades within the limits, the court would compel the corporation to allow the defendant to inspect the by-law, because it must be taken to have been made for the public weal, and for the rule and government of persons dwelling within the borough.²

§ 1497. The rules just mentioned apply with equal force to *parish books*. Thus, *parishioners* have a right to inspect them for ordinary parochial purposes, as, for instance, if a dispute be pending respecting the validity of a rate,³ or the like; but they are not, as it seems, entitled to have access to them for purposes unconnected with the affairs of the parish.⁴ Thus, access to parish books has been refused to a parishioner, who, being sued for a libel upon the vestry clerk, sought to inspect the books, for the purpose of enabling him to plead a justification.⁵ So, a parishioner has no right to inspect parish books, for the mere purpose of obtaining information to support his claim to an estate in the parish.⁶ Moreover, *strangers* have, as a general rule, no right to an inspection at all; and so strictly was this rule once enforced, that where a party brought an action of trespass against parish-officers, for entering his house to distrain for poor-rates, and the defendants having averred in justification that the house was within the parish, the plaintiff took

¹ *May. of Southampton v. Graves*, 8 T. R. 590; overruling *May. of Lynn v. Denton*, 1 T. K. 689, and *Barnstable v. Lathey*, 3 T. R. 303; *Bolton v. Corp. of Liverpool*, 3 Sim. 467; 1 Myl. & K. 88, S. C., recognised in *Nias v. North & East. Ry. Co.*, 3 Myl. & Cr. 357.

² *Harrison v. Williams*, 3 B. & C. 162.

³ *Newell v. Simpkin*, 6 Bing. 565.

⁴ *May v. Gwynne*, 3 B. & A. 301. In *R. v. Harrison*, 2 Sess. Cas. 490; 9 Q. B. 794, S. C., the court refused to grant a mandamus for a rate-payer of a township to inspect the appointment of overseers of the poor for that township.

⁵ *May. v. Gwynne*, 4 B. & A. 301.

⁶ *R. v. Smallpiece*, 2 Chit. R. 288.

issue on this fact, the court held that, at common law, he could not demand an inspection of the parish books, though the defendants alleged that he was a parishioner, for he himself denied the allegation.¹ However, in that case, a bill of discovery having been filed, the Court of Chancery ordered the defendants to produce the rate books and other parish documents, which related to the matter in question.² Again, where the inhabitants of a parish had indicted those of a county for non-repair of a bridge, and the question was, which of the litigants were liable to repair it, the court refused to compel the prosecutors to allow the defendants to inspect the parish documents which related to the repair of the bridge.³

§ 1498. The books kept by commissioners of sewers may be men- § 1349
tioned in the same category with parish books; that is, strangers are not entitled to inspect them; and even parties assessed to the sewer-rate have no general right of inspection, but can only claim access to such entries and proceedings as have reference to the rate to which they are themselves assessed, and to the level where their property is situated.⁴ So, where a person was prosecuted for practicing physic, not being a member of the College of Physicians, nor having a licence, nor being a graduate of either University, the court refused to grant him a rule to inspect the books of the college, on the ground that he was not a member of that body.⁵ It has been held, however, that a *bishop's register of presentations and institutions* is kept for the use of all persons claiming title to livings in his diocese; and, accordingly, where the bishop himself and a private person were adverse claimants of the patronage of a particular benefice, the court granted a mandamus to compel the bishop to allow his opponent to inspect so much of the register as related to the benefice in

¹ Burrell v. Nicholson, 3 B. & Ad. 649.

² Burrell v. Nicholson, 1 Myl. & K. 680.

³ R. v. Buckingham Js., 8 B. & C. 375.

⁴ R. v. Comm. of Sewers for Tower Haml., 3 Q. B. 670. See, as to books kept by the Metrop. Board of Works, 18 & 19 V., c. 120, § 61.

⁵ R. v. Dr. West, cited 2 Wils. 240; 5 Mod. 395, 396, S. C.

question.¹ So, a prebendary may, at all reasonable times, inspect such of the charters, statutes, injunctions, and acts of the Chapter, as may be necessary to establish or illustrate his rights concerning his prebend.²

§ 1499. On a similar principle, *fundholders* have been held § 1350 entitled to inspect and take copies of such entries in the *deposit and transfer books of the Bank of England*,³ or of the *East-India Company*, as relate to stock in which they claim to be interested;⁴ and merchants can demand access to such of the *Custom House books* as contain entries with regard to their goods.⁵ The same doctrine renders a limited inspection of any other books and documents a matter of right, when they constitute the common evidence of transactions between public offices and private individuals, and where the inspection is necessary to establish some disputed claim.⁶ On the other hand, access to these books will not be granted in favour of persons, who have either no interest in them, or who seek to inspect them for some private object unconnected with the purposes for which the books are kept. For instance, where a party brought a *qui tam* action against a postmaster for interfering in the election of a member of Parliament, the court refused the plaintiff a rule to inspect the books of the post-office, because the suit did not relate to any transaction in that office, and the applicant had no interest in his books.⁷

§ 1500. In accordance with the invariable rule which protects a § 1351

¹ *R. v. Bp. of Ely*, 8 B. & C. 112; S. C. nom. *Finch v. Bp. of Ely*, 2 M. & R. 127.

² *Young v. Lynch*, 1 W. Bl. 27.

³ *Foster v. Bk. of England*, 8 Q. B. 689.

⁴ *Geery v. Hopkins*, 2 Ld. Ray, 851; 7 Mod. 129, S. C. As to the right of inspecting documents under "the Colonial Stock Act, 1877," see 40 & 41 V., c. 59, §§ 1, 18.

⁵ *Crew v. Saunders*, 2 Str. 1005.

⁶ See note by Mr. Nolan to *R. v. Hostmen of Newcastle*, 2 Str. 1223, where all the older authorities on the subject are collected and classified. See, also, *R. v. King*, 2 T. R. 235, per Ashurst, J., as to the assessments of the land tax.

⁷ *Crew v. Saunders*, 2 Str. 1005. See *Atherfold v. Beard*, 2 T. R. 610; *Benson v. Post*, 1 Wils. 240. See, also, ante, § 1497.

witness or party from being compelled to furnish evidence, that may expose him to a criminal charge,¹ the Court will never oblige a person to allow the inspection² of either public or private documents in his custody, where the inspection is sought for the purpose of *supporting a prosecution against himself*.³ An information in the nature of a quo warranto is not considered as a criminal proceeding within the meaning of this rule;⁴ nor is a mandamus, at least if the object be to enforce a civil right;⁵ but where the lord of a manor was indicted for not repairing the bank of a river *ratione tenuræ*, it was in vain urged in support of a rule to inspect the court rolls, that the indictment, though in form a criminal proceeding, was really to try the right of repair, which was a civil right.⁶

§ 1501. Where writs, or other proceeding in a cause, are § 1352
officially in the custody of an officer of the court, it may be doubtful whether he can be compelled to permit them to be inspected for the purpose of furnishing evidence in a civil action against himself. For instance, if an action be brought against the governor of Holloway prison for the escape of a debtor, has the plaintiff a right to inspect the writ by which the debtor was committed to the defendant's custody? On this point the old courts of Queen's Bench and Common Pleas came, a few years ago, to opposite conclusions.⁷

§ 1502. In all cases where the interference of a court is required § 1353
in order to obtain the inspection of a document, it must appear by

¹ Ante, § 1453.

² The Order respecting discovery and inspection in the Rules of the Sup. Ct., 1883, viz., Ord. XXXI., does not affect either criminal proceedings, or proceedings on the Crown or Revenue sides of the Q. B. D. See Ord. LXVIII.

³ Wigr. Disc. §§ 130—132, 268—270, 285, et seq.; *Ld. Montague v. Dudman*, 2 Ves. Sen. 397; *Glyn v. Houston*, 1 Keen, 329; *R. v. Purnell*, 1 W. Bl. 37; 1 Wils. 239, S. C.; *R. v. Heydon*, 1 W. Bl. 351; *R. v. Buckingham Js.*, 8 B. & C. 375; *R. v. Cornelius*, 2 Str. 1210; 1 Wils. 142, S. C. See *Bradshaw v. Murphy*, 7 C. & P. 712, sed qu.

⁴ *R. v. Shelley*, 3 T. R. 141; *R. v. Babb*, id. 582; *R. v. Purnell*, 1 W. Bl. 45.

⁵ *R. v. Ambergate, &c., Ry. Co.*, 17 Q. B. 957.

⁶ *R. v. E. Cadogan*, 5 B. & A. 902; 1 D. & R. 550, S. C.

⁷ *Fox v. Jones*, 7 B. & C. 732; *Davies v. Brown*, 9 Moore, 778. See, also, *R. v. Sheriff of Chester*, 1 Chit. R. 477.

affidavit that an express *demand* to inspect has been made to the proper quarter, and has been distinctly *refused*.¹ It seems also that this demand must come either directly from the applicant or indirectly from his agent, and that it will not suffice if it be made by a person whom the agent has employed for that purpose.² In stating that there must be a distinct refusal, it is not meant that the word "refuse" or any equivalent expression should be employed, but it will be enough if the party applied to shows clearly by his conduct that he is determined not to do what is required.³ Still, nothing short of this will suffice; and therefore, where a shareholder in a company applied to the committee for leave to inspect the books of the company, and was told by the chairman that the committee would take time to consider the request; whereupon, ten days afterwards, he again applied to the clerk, who refused inspection, though it did not appear that the refusal was authorized by the committee; the Court of Queen's Bench held that no sufficient refusal by the committee had been proved, to warrant the making absolute a rule for a mandamus.⁴ If, on the application of a party the liberty to inspect books be *offered as a favour*, though *not as a right*, and be consequently declined by the applicant, it may be questionable whether the Court will interfere.⁵ Where a party applied to a judge on summons for leave to inspect certain books, but the judge, after hearing both parties, referred the question to the court, it seems to have been considered that the proceedings at chambers were equivalent to a demand and refusal.⁶

§ 1503. The preceding observations have been confined to those § 1354

¹ *R. v. Wilts. & Berks. Can. Co.*, 3 A. & E. 477; 5 N. & M. 344, S. C.; *R. v. Bristol & Exeter Ry. Co.*, 4 Q. B. 162. But the objection that the affidavits disclose no sufficient demand and refusal must be taken before the merits are discussed, 4 Q. B. 171, per *Ld. Denman*, recognising *R. v. East. Cos. Ry. Co.*, 10 A. & E. 531, 545, n. *b.*

² *Ex p. Hutt*, 7 Dowl. 690.

³ *R. v. Brecknock & Aberg. Can. Co.*, 3 A. & E. 222, 223, per *Ld. Denman & Littledale, J.*

⁴ *R. v. Wilts. & Berks. Can. Co.*, 3 A. & E. 477; 5 N. & M. 344, S. C.

⁵ *R. v. Trust. of Northleach & Witney Roads*, 5 B. & Ad. 978, 982, per *Ld. Denman*.

⁶ *Birming. Brist. & Thames Junct. Ry. Co. v. White*, 1 Q. B. 282, 286; 4 P. & D. 649, S. C.

cases where the right of inspection depends upon the common law; but it now becomes necessary to advert to some *statutes*, which especially provide for the keeping of particular public documents, and for their inspection by parties interested. Thus the Act of 6 & 7 W. 4, c. 86,—as amended by the Births and Deaths Registration Act, 1874,¹—entitles any person to search the register-books of *births, baptisms, marriages, deaths and burials*, and the indexes thereto, and to demand certified copies of any entry in the books, on payment of a small fee;² the Act of 16 &

¹ 37 & 38 V., c. 88.

² 6 & 7 W. 4, c. 86, § 35, enacts, that “every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time being of any register-book of births, deaths, or marriages, shall at all reasonable times allow searches to be made of *any register-book in his keeping*.” [This will include register-books of *baptisms and burials*, which the rector, vicar, or curate of each parish is bound to keep, under the provisions of 52 G. 3, c. 146, § 5.] “And shall give a copy certified under his hand of any entry or entries in the same, on payment of the fee hereinafter mentioned; (that is to say,) for every search extending over a period not more than one year, the sum of one shilling, and sixpence additional for every additional year, and the sum of two shillings and sixpence for every single certificate.”

§ 36 is now repealed by 37 & 38 V., c. 88, § 54, and in lieu thereof it is enacted, by § 32 of the same Act, that the registrar-general shall supply to the superintendent registrars suitable forms and indexes with respect to births and deaths, and that “every person shall be entitled at all reasonable hours to search the said indexes, and to have a certified copy of any entry or entries in the said register-books under the hand of the superintendent registrar, on payment in each case of the appointed fee:”—that is, as explained in the 2nd Sched., for a general search, five shillings; for a particular search, one shilling; for a certified copy, two shillings and sixpence.

6 & 7 W. 4, c. 86, § 37, enacts, that “the registrar-general shall cause indexes of all the said certified copies of the registers to be made, and kept in the general register office; and that every person shall be entitled, on payment of the fees hereafter mentioned, to search the said indexes between the hours of ten in the morning and four in the afternoon of every day, except Sundays, Christmas-day, and Good Friday, and to have a certified copy of any entry in the said certified copies of the registers; and for every general search of the said indexes shall be paid the sum of twenty shillings, and for every particular search the sum of one shilling; and for every such certified copy the sum of two shillings and sixpence, and no more, shall be paid to the registrar-general, or such other officer as shall be appointed for that purpose on his account.” The Act for registering marriages, and also the Act for registering births and deaths, in Ireland, respectively contain similar provisions. See 7 & 8 V., c. 81, §§ 68—70, Ir., and 26 & 27 V., c. 11, §§ 50—52, Ir. See, also, 52 G. 3, c. 146, § 5.

17 V., c. 134,¹ and the Registration of Burials Act, 1864,² contain similar provisions with respect to searches to be made in, and copies and extracts to be taken from, the registers of burials respectively kept under the directions of the Metropolitan Interment Act,³ and of those acts; the *Act for Marriages*, passed in the last reign, enacts, that the "marriage notice book," which the superintendent-registrar is bound to keep, shall be "open at all reasonable times without fee to all persons desirous of inspecting the same";⁴ while, under the Acts of 3 & 4 V., c. 92, and 21 & 22 V., c. 25, which respectively provide for the deposit of certain *non-parochial registers*⁵ in the custody of the registrar-general, every

¹ § 8 enacts, that "all burials within any burial-ground provided under" [the Act of 15 & 16 V., c. 85], "or this Act, shall be registered in a register-book to be provided by the burial board providing such ground, (or where the same is provided by the commissioners of sewers of the city of London, then by such commissioners,) and kept for that purpose according to the laws in force by which registers are required to be kept by the rectors, vicars, or curates of parishes, or ecclesiastical districts in England; and such register-book shall be kept by some officer appointed by the said board or commissioners to that duty; and in such register-books shall be distinguished in what parts of the burial-ground, and, where the whole of such burial-ground is not consecrated for interment according to the rites of the united Church of England and Ireland, whether in the portion so consecrated, or in the portion not so consecrated, the several bodies (the burials of which are entered in such register-books) are buried; and in case such burial-ground has been provided for more than one parish, such register shall be kept or indexed so as to facilitate searches for entries in such books, in respect of bodies from the several parishes; and such register-books, or copies, or extracts therefrom, shall be received in all courts as evidence of the burials entered therein; and copies or transcripts of such register-books, verified and signed by such officer as aforesaid, shall be from time to time sent to the registrar of the diocese, to be kept with the copies of the other register-books of the parishes within such diocese, and the said register-books, so far as respects searches to be made therein and copies and extracts to be taken therefrom, shall be subject to the same regulations as are provided by [6 & 7 W. 4, c. 86], so far as such regulations relate to register-books of burials kept by any rector, vicar, or curate."

² 27 & 28 V., c. 97, § 6.

³ 15 & 16 V., c. 85.

⁴ 6 & 7 W. 4, c. 85, § 5; 7 & 8 V., c. 81, §§ 2, 14, Ir.; 26 & 27, V., c. 27, §§ 2, 3, Ir.

⁵ These registers consist of more than seven thousand books, belonging to one or other of the following religious communities:—The foreign Protestant churches in England; the Quakers; the Presbyterians; the Independents; the Baptists; the Wesleyan Methodists, in their several branches; the Mora-

person is entitled, on payment of certain fees, but *upon personal application only*,¹ to inspect these registers and the lists of the same,² and to have certified extracts of such entries as he may require.³ A similar law prevails with respect to the register of vians; the Countess of Huntingdon's connection; the Calvinistic Methodists and the Swedenborgians. Besides these, a few registers have been deposited, which belong either to Roman Catholic, Irvingite, Inghamite, Bible Christian, New Jerusalemite, Unitarian, or Scotch Church congregations. The registers transmitted from the foreign Protestant churches contain entries of births, baptisms, marriages, deaths, and burials; and those sent by the Quakers are registers of births, marriages, and deaths. The remaining books are for the most part registers of births or baptisms, but there are some registers of deaths or burials, and one or two registers of marriages. The dates of these books range from the middle of the 16th century to the year 1840. Most of the registers were sent to the registrar-general from the minister of the congregation to which they belonged, but a valuable collection of these documents was transmitted from Dr. Williams' library, in Redcross-street, and another smaller one from the Wesleyan Registry in Paternoster-row. It may be observed, that the Jews have declined to part with their registers, as have also the Roman Catholic prelates in most instances. The registers, too, of births and deaths, which are kept at the Herald's College from the year 1747 to 1783; the records of Indian baptisms, deaths, and marriages, deposited at the office of the Secretary for India, and the registers of births, baptisms, marriages, and burials of British subjects abroad, transmitted to the registry of the Consistory Court of London, are excluded from the operation of the Act. See Report of Commiss. appointed to inquire into the state, &c., of non-parochial registers, which was presented to Parliament in 1838; and another report of the Commiss. bearing date 31 Dec., 1857.

¹ See fly-sheet to "Lists of Non-Parochial Registers," published by the registrar-general, pursuant to the Act of 1841.

² A list of the non-parochial registers in the custody of the registrar-general was published in 1841, and contains a statement—1, of the number marked on each register—2, of the name of the place of worship—3, of the denomination and date of the foundation—4, of the name of the last minister—5, of the number of the books deposited, and the nature of the entries—and, 6, of the period over which each register extends. Copies of this list have been sent to every person, congregation, or society, having had the custody of any of the deposited registers, as also to every superintendent-registrar, and to the registrar-general, to be open for inspection at the respective offices, without fee. A list of the registers deposited under 21 & 22 V., c. 25, is given in App. A to the Report of the Commiss. dated 31 Dec., 1857.

³ 3 & 4 V., c. 92, § 5, enacts, that "the registrar-general shall cause lists to be made of all the registers and records which may be placed in his custody by virtue of this Act; and every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said lists, and any register or record therein mentioned, between the hours of ten in the morning and four in the afternoon of every day, except Sundays and Christmas-day, and Good Friday, but subject to such regulations as may be made from time to time by the registrar-general, with the approbation of one of her Majesty's principal Secretaries of

marriages in the Ionian Islands, which is now deposited with the Registrar-General.¹

§ 1504. Again the *Municipal Corporation Act*, 1882,² contains in § 233, the following special provisions relating to the inspection and copying of documents. “(1.) The minutes of proceeding of the council shall be open to the inspection of a burgess on payment of a fee of one shilling, and a burgess may make a copy thereof or take an extract therefrom.

“(2.) A burgess may make a copy of, or take an extract from, an order of the council for the payment of money.

“(3.) The treasurer’s accounts shall be open to the inspection of the council, and a member of the council may make a copy thereof or take an extract therefrom.

“(4.) The abstract of the treasurer’s accounts shall be open to the inspection of all the ratepayers of the borough, and copies thereof shall be delivered to a ratepayer on payment of a reasonable price for each copy.

“(5.) The Freeman’s Roll shall be open to public inspection, and the town clerk shall deliver copies thereof to any person on payment of a reasonable price for each copy.

“(6.) A document directed by this Act to be open to inspection shall be so open at any reasonable time during the ordinary hours of business, and without payment, unless it be otherwise expressed.

“(7.) If a person having the custody of any documents in this section mentioned,—(a) obstructs any person authorised to inspect the same in making such inspection thereof as in this section mentioned; or (b) refuses to give copies or extracts to any person entitled to obtain the same under this section;—he shall,

State, and to have a certified extract of any entry in the said registers or records; and for every search in any such register or record shall be paid the sum of one shilling; and for every such certified extract the sum of two shillings and sixpence, and no more.”

¹ 27 & 28 V., c. 77, § 9.

² 45 & 46 V., c. 50.

on summary conviction, be liable to a fine not exceeding five pounds."

§ 1505. Under the Elementary Education Act, 1870, "every § 1355A ratepayer in a school district may, at all reasonable times, without payment, inspect and take copies of or extracts from all books and documents belonging to or under the control of the school board of such district."¹ So, also, under certain circumstances, defined in "the Parliamentary and Municipal Registration Act, 1878,"² burgesses have a right, free of charge, to inspect and make copies of the books containing the poor rates.

§ 1506. "Any person interested in or assessed to any rate" made under the Public Health Act, 1875, "may inspect the same, and any estimate made previously thereto, and may take copies of or extracts therefrom without fee or reward."³ So, also, all registers of mortgages on rates, kept at the offices of the Local Authorities under the same Act, "shall be open to public inspection during office hours without fee or reward."⁴ The Registers of the Voters under the same Act are also open to a limited inspection.⁵

§ 1507. Under the *Companies Act*, 1862, any person may § 1356 inspect, and require a certified copy or extract of, any document which is kept by the *registrar of joint-stock companies*;⁶ and every member of a company duly registered under that Act is entitled, during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, to inspect gratis the register of members which if kept at the registered office of the company.⁷ Even strangers have a similar right on payment of a small fee, and they, as well as members, can obtain a copy of any part of the register, if they are prepared to pay sixpence for every hundred words copied.⁸ So, the *Companies Clauses Consolidation Act*,—which applies to every joint-stock company incor-

¹ 33 & 34 V., c. 75, § 87.

² 41 & 42 V., c. 26, § 13.

³ 38 & 39 V., c. 55, § 219.

⁴ § 237.

⁵ Sch. 2, Rule 1, sub-rule 30.

⁶ 25 & 26 V., c. 89, § 174, r. 5. See *R. v. Mariquita & New Gren. Min. Co.*, 28 L. J., Q. B. 67.

⁷ 25 & 26 V., c. 89, § 32.

⁸ *Id.*

porated by statute since the 8th of May, 1845, for the purpose of carrying on any undertaking,—contains several provisions authorising parties interested to inspect and demand copies of the books and documents relating to the company's affairs;¹ and the

¹ 8 & 9 V., c. 16, § 10, enacts, that “in addition to the register of shareholders, the company shall provide a book to be called the ‘Shareholders’ Address Book,’ in which the secretary shall, from time to time, enter in alphabetical order the corporate names and places of business of the several shareholders of the company, being corporations, and the surnames of the several other shareholders with their respective Christian names, places of abode, and descriptions, so far as the same shall be known to the company; and every shareholder, or if such shareholder be a corporation, the clerk or agent of such corporation, may at all convenient times peruse such book gratis, and may require a copy thereof or of any part thereof; and for every hundred words so required to be copied, the company may demand a sum not exceeding sixpence.” § 45 enacts, that “a register of mortgages and bonds shall be kept by the secretary, and within fourteen days after the date of any such mortgage or bond, an entry or memorial specifying the number and date of such mortgage or bond, and the sums secured thereby, and the names of the parties thereto, with their proper additions, shall be made in such register; and such register may be perused at all reasonable times by any of the shareholders, or by any mortgagee or bond creditor of the company, or by any person interested in any such mortgage or bond, without fee or reward.” § 63 enacts, that “the company shall from time to time cause the names of the several parties who may be interested in [the general capital stock of the company], with the amount of the interest therein possessed by them respectively, to be entered in a book to be kept for that purpose, and to be called the ‘Register of Holders of Consolidated Stock;’ and such book shall be accessible at all seasonable times to the several holders of shares or stock in the undertaking.” §§ 115, 116, provide, that “accounts shall be kept by the directors, and that the books of the company shall be balanced at certain periods.” § 117 then enacts, that “the books so balanced, together with such balance-sheet as aforesaid, shall for the prescribed periods, and, if no periods be prescribed, for fourteen days previous to each ordinary meeting, and for one month thereafter, be open for the inspection of the shareholders at the principal office or place of business of the company; but the shareholders shall not be entitled at any time, except during the periods aforesaid, to demand the inspection of such books, unless in virtue of a written order signed by three of the directors.” § 118 enacts, that “the directors shall produce to the shareholders assembled at such ordinary meeting, the said balance-sheet applicable to the period immediately preceding such meeting, together with the report of the auditors thereon, as hereinbefore provided.” § 119 enacts, that “the directors shall appoint a book-keeper to enter the accounts aforesaid in books to be provided for the purpose; and every such book-keeper shall permit any shareholder to inspect such books, and take copies or extracts therefrom, at any reasonable time during the prescribed periods, and if no periods be prescribed, during one fortnight before, and one month after, every ordinary meeting; and if he fail to permit any such shareholder to inspect such books, or take copies or extracts therefrom,

same observations may be made with respect to the *Commissioners Clauses Act*,¹ to several other *Consolidation Acts* passed in 1847,² to the *Railway Companies Securities Act*,³ 1866, and to the *Metropolis Water Act*, 1871.⁴ The *Railway Clauses Consolidation Act*,⁵—which applies to all railways authorised to be constructed since the 8th of May, 1845,—contains also an important provision on this subject, for it enacts, in § 107, that every railway company subject to that Act shall, if required, transmit a copy of its annual account of disbursements and receipts, duly audited, and free of charge, to the overseers of the poor of the several parishes, and to the clerks of the peace of the counties, through which the railway shall pass; and such accounts shall be open to the inspection of the public at all reasonable hours, on payment of one shilling. An easy mode is thus afforded of ascertaining the sum at which the company should be assessed to the parochial and county rates.

§ 1508. On payment of the prescribed fees in the shape of stamps, “any person may inspect, and make copies of, and extracts from, the register of securities, the register of mortgage debentures, and the returns made by the company to the registrar,” under the provisions of the Mortgage Debenture Act, 1865.⁶ So the registers of “Nominal Securities,” which are kept under “The Local Loans Act, 1875,” may be inspected at all reasonable times by any person upon payment of the prescribed fee.⁷

§ 1509. Under “The Friendly Societies Act, 1875,” “any member or person having an interest in the funds of the society” may “inspect the books at all reasonable hours at the registered

during the periods aforesaid, he shall forfeit to such shareholder for every such offence a sum not exceeding five pounds.” See *R. v. Lond. & St. Katharine Dock Co.*, 44 L. J. Q. B. 4.

¹ 10 & 11 V., c. 16, §§ 31, 55, 76, 88—90.

² See *Markets and Fairs Cl. Act*, 10 & 11 V., c. 14, § 50; *Gas-Works Cl. Act*, id. c. 15, § 38; *Waterworks Cl. Act*, id. c. 17, § 83; *Harbours, Docks, and Piers Cl. Act*, id. c. 27, § 50.

³ 29 & 30 V., c. 108, §§ 7, 8, 9, 12.

⁴ 34 & 35 V., c. 113, §§ 23, 37.

⁵ 8 & 9 V., c. 20.

⁶ 28 & 29 V., c. 78; 33 & 34 V., c. 20, § 11.

⁷ 38 & 39 V., c. 83, § 24.

office of the society;" but this enactment will not empower one member to inspect the loan account of another without his written consent.¹

§ 1510. Under "The Land Transfer Act, 1875." any registered proprietor of any land or charge, and any person authorised by him, or by an order of the court, or by general rule, but no other person, may, subject to the regulations in force, inspect and make copies of, and extracts from, any register or document in the custody of the registrar relating to such land or charge.² Subject also to such regulations as may be made by the Treasury, every person has a right to search any of the indexes kept at the office for the registration of assurance of lands in Ireland.³

§ 1511. Again, the *Copyright Amendment Act*⁴ provides,—and § 1357 the provision is incorporated in the *International Copyright Act*,⁵ and in the Act relating to *Copyright in Works of Art*,⁶—that a register of the proprietorship of copyright, and of the assignments thereof, shall be kept at the Hall of the Stationers' Company, and shall, at all convenient times, be open to the inspection of any

¹ 38 & 39 V., c. 60, § 14, subs. 1, R. (g).

² 38 & 39 V., c. 87, § 104.

³ 13 & 14 V., c. 72, § 52, Ir.

⁴ 5 & 6 V., c. 45, § 11, enacts, that "a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignment thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the inspection of any person, on payment of one shilling for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand and impressed with a stamp of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such copies so certified and impressed shall be received in evidence in all courts, and in all summary proceedings, and shall be *prima facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in case of dramatic or musical pieces, shall be *prima facie* proof of the right of representation or performance, subject to be rebutted as aforesaid." See *Lucas v. Cook*, L. R., 13 Ch. D. 872, per Fry, J.

⁵ 7 & 8 V., c. 12, § 8.

⁶ 25 & 26 V., c. 68, §§ 4, 5.

person, on payment of one shilling for every entry inspected; and the officer of the company is also required, on payment of five shillings, to give a certified copy of any entry to any person demanding it. So, under "The Patents, Designs, and Trade Marks Act, 1883," every register, whether of patents, or of designs, or of trade marks which is kept in the Patent Office, must, at all "convenient times, be open to the inspection of the public, subject to such regulations as may be prescribed; ¹ and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same, on payment of the prescribed fee." ² The Patents Rules, 1883, further provide by Rule 76, that "certified copies of, or extracts from, patents, specifications, disclaimers, affidavits, statutory declarations, and other public documents in the Patent Office, or of or from registers or other books kept there, may be furnished by the comptroller on payment of the prescribed fee." ³

§ 1512. By the joint operation of "The Solicitors Acts, 1843 § 1358 and 1877," ⁴ every person is entitled, without fee, to have free access to the rolls of solicitors, which are now kept by the officer appointed for that purpose under the last-named Act;—to the books containing an abstract of the affidavits sworn by such solicitors as have articulated clerks, which books are placed under the same custody as the rolls;—and to the books kept by the registrar, in which are entered the particulars of the declarations signed by solicitors preparatory to obtaining their certificates.

§ 1513. Under "The High Peak Mining Customs and Mineral Courts Act, 1851," all persons are at liberty, at convenient times in the day-time, to search and examine all documents in the custody

¹ See Patents Rules, 1883, R. 75, & Sch. I., R. 32, cited in 53 L. J., Ord & Rules, 86, 89.

² 46 & 47 V., c. 57, § 88. But see § 52, which limits the right of inspecting registered designs. See as to the fee, Patents Rules, Sch. I., RR. 33, 34, 35.

³ See as to the fee, Sch. I., RR. 33, 34, 35.

⁴ 6 & 7 V., c. 73, §§ 11, 23; 40 & 41 V., c. 25, 2nd Sched. Part 2, Sect. substituted for 6 & 7 V., c. 73, § 20. See, also, 29 & 30 V., c. 84, §§ 15, 26, 29. Ir.

of the Steward of the Barmote Courts by virtue of the Act, upon payment of the fees therein specified.¹

§ 1514. By the Act of 7 W. 4 & 1 V., c. 83, § 1, clerks of the peace, town-clerks, and other persons holding official situations are required to take custody of all maps, plans, sections, books, and writings, which, by the standing orders of either House of Parliament, are directed to be deposited with them, previous to the introduction of any railway bill, or other bill of a like nature; and the same statute enacts, in § 2, that all persons interested shall have liberty to inspect, and take copies of, or extracts from these documents, on payment of certain regulated fees. The provisions of this Act have been extended by several consolidation and other Acts to the maps, plans, and sections of other undertakings, and to the maps, plans, and sections of alterations proposed to be made therein;² as also to copies of the Special Acts, by which particular companies, commissioners, or other undertakers have been authorised to act.³ § 1369

§ 1515. Under the *Juror's Act*, the churchwardens and overseers of every parish are directed to make out a list of every person qualified to serve on juries, and to allow such list to be perused gratis by any inhabitant, at all reasonable times during the first three weeks of September;⁴ while the Common Law Procedure Act of 1851, enacts, that a printed panel of the jurors summoned, whether common or special, shall, seven days at least before the sitting of every court, be kept at the sheriff's office for public § 1361

¹ 14 & 15 V., c. 94, § 45.

² See Rail. Cl. Consol. Act, 8 & 9 V., c. 20, § 9; do. for Scotl., id. c. 33, § 9; Waterworks Cl. Act, 10 & 11 V., c. 17, & 21.

³ Comp. Cl. Consol. Act, 8 & 9 V., c. 16, § 161; do. for Scotl., id. c. 17, § 165; Lands Cl. Consol. Act, id. c. 18, § 150; do. for Scotl., id. c. 19, § 142; Rail. Cl. Consol. Act, id. c. 20, § 162; do. for Scotl., id. c. 33, § 153; Markets and Fairs Cl. Act, 10 & 11 V., c. 14, § 58; Gas-works Cl. Act, id. c. 15, § 45; Comm. Cl. Act, id. c. 16, § 110; Water-works Cl. Act, id. c. 17, § 90; Harbours, Docks, and Piers Cl. Act, id. c. 27, § 97; Towns Improvement Cl. Act, id. c. 34, § 214; Cemeteries Cl. Act, c. 65, § 66; and Town Police Cl. Act, id. c. 89, § 77. See 9 & 10 V., c. 39, § 6. See, also, 9 & 10 V., c. 3, § 13, as to plans, &c., of harbours, and other works in Ireland, constructed by Comm. to encourage sea fisheries.

⁴ 6 G. 4, c. 50, § 9.

inspection, and that a printed copy of such panel shall be delivered by the sheriff to any party requiring it, on payment of one shilling.¹

§ 1516. Under the Act of 1843 for *registering persons entitled to vote for members of Parliament*, every person is at liberty, during the fortnight next after publication, to inspect gratis the lists of claimants, the registers of voters, and the lists of persons objected to, which are made out by the overseers and town clerks respectively, as also to obtain written or printed copies of these documents, on payment of a small sum.² So, after the registers have been revised, any person may purchase at a stipulated price, from the clerk of the peace, a printed copy of the county register, and from the town-clerk a like copy of the borough register.³ Under the same Act, every registered elector and claimant may, between the 10th and 31st of August, without payment of any fee, inspect and take extracts from any poor-rate book for any purpose relating to any claim or objection, made, or intended to be made, by or against him.⁴ So, also, under the Act of 41 & 42 V., c. 26, a more extensive right to inspect and make copies of poor-rates is afforded to every person "who is registered as a parliamentary voter."⁵ Again, under the *Ballot Act*, 1872, all documents forwarded by the returning officer to the Clerk of the Crown in Chancery,⁶ other than ballot papers and counterfoils, are open to public inspection at such time and under such regulations as the clerk, with the consent of the Speaker, may prescribe; and the Clerk will also supply copies or extracts to any person on the payment of such fees as the Treasury may sanction.⁷ § 1362

§ 1517 Under the *Poor law Act* of 1834, every owner of property, or his agent, and every rate-payer, is entitled to inspect § 1363

¹ 15 & 16 V., c. 76, §§ 106—108; 6 G. 4, c. 50, § 19. As to the practice in Ireland, see 34 & 35 V., c. 65, §§ 12, 18, Ir.

² 6 & 7 V., c. 18, §§ 5, 8, 13, 14, 18, 20. As to the law in Ireland, see 13 & 14 V., c. 69.

³ 6 & 7 V., c. 18, § 49.

⁴ Id. § 16.

⁵ § 13.

⁶ That is, it is presumed, to the Crown Office Department of the Central Office.

⁷ 35 & 36 V., c. 33, 1st Sch. 1st Part, r. 42.

gratis the rules sent by the late Poor-law Board, or the present Local Government Board, to the overseers of his parish, or to the guardians of his union, as also to take copies of such rules, or to require copies to be furnished to him, on payment of a trifling charge.¹ For seven days, too, before the auditing of the overseers' accounts, their rate books are open, between the hours of eleven and three, for the inspection of every person liable to be rated to the relief of the poor.²

§ 1518. Under the Valuation Metropolis Act, 1869, any documents required by that Act to be deposited with the rate-books of the parish, and especially all valuation lists, may be inspected and copied without charge by any ratepayer.³ § 1363A

§ 1519. Under the *Highway Act*, the surveyors are directed to keep books of account, and these books are open at all reasonable times to the inspection of all inhabitants rated to the highway rate of the parish or district, who are also entitled to take copies or extracts from them without fee.⁴ So, under the Acts regulating the *Turnpike roads*, the books containing the oaths, orders, accounts, and proceedings of the trustees, as well as those kept for registering mortgages or assignments, may be inspected and copied gratis, at all seasonable times, by the trustees, or by any creditor of the tolls;⁵ while, by the Act relating to *Turnpike-trusts in South Wales*, similar books, kept by the County Roads' Board, may be inspected and copied without fee by all members of such board, and of all district boards within the county, and by every person paying any rate by that Act authorised to be made.⁶ § 1364

§ 1520. The annual accounts of the *Trustees of Charities*, which are now, by virtue of the Charitable Trusts Acts of 1853 and § 1365

¹ 4 & 5 W. 4, c. 76, § 18. See 10 & 11 V., c. 109, §§ 10, 29; 34 & 35 V., c. 70.

² 7 & 8 V., c. 101, § 33. See, also, 17 G. 2, c. 3, § 3; 6 & 7 W. 4, c. 96, § 5; *Tennant v. Creston*, 2 Sess. Cas. 425; and *Tennant v. Bell*, 9 Q. B. 684.

³ 32 & 33 V., c. 67, §§ 67—69.

⁴ 5 & 6 W. 4, c. 50, § 40.

⁵ 3 G. 4, c. 126, §§ 72, 73; 9 G. 4, c. 77, § 2.

⁶ 7 & 8 V., c. 91, § 71.

1855, either deposited at the office of the Charity Commissioners, or inserted in the books of the local vestries, are open to the inspection of all persons at all seasonable hours, subject to the regulations of the Board of Commissioners; and, moreover, any person may, on payment of a trifling sum, require a copy of any such account, or of any part thereof.¹ So, the books of accounts, which the commissioners of *public baths* are directed to keep, may be examined and copied gratis by any commissioner, churchwarden, overseer, or rate-payer, of the parish in which the baths are established.² Similar clauses are inserted in the Act which now regulates the operations of the Metropolitan Board of Works.³

§ 1522. Under the Newspaper Libel and Registration Act, 1881, § 1367 all persons are at liberty to search and inspect the book called "The Register of Newspaper Proprietors," which is kept by the Registrar of Joint-stock Companies, and to demand certified copies of any such entry.⁴ Again, every person may, upon payment of a reasonable fee, inspect the register book kept by any registrar of British ships under the Merchant Shipping Act of 1854,⁵ as also any of the documents recorded by the registrar-general of Shipping and Seamen.⁶ In addition to this long and repulsive string of statutes, many other public Acts, and a vast number of local and personal Acts, contain provisions enabling interested persons to inspect and obtain copies of particular documents.⁷

§ 1523. THE MODE OF PROVING PUBLIC DOCUMENTS must now § 1368 in the SECOND PLACE, be considered. And, first, as to the *legislative Acts*. It has already been seen that *public statutes* need no proof, being supposed to exist in the memories of all.⁸ Still, for certainty of recollection, reference is had to a printed copy, and if the accuracy of such copy be questionable, the court will consult the

¹ 18 & 19 V., c. 124, § 44, amending § 61 of 16 & 17 V., c. 137.

² 9 & 10 V., c. 74, § 14; id. c. 87, § 5, Ir.

³ 18 & 19 V., c. 120, §§ 61, 198, 199.

⁴ 44 & 45 V., c. 60, § 13.

⁵ 17 & 18 V., c. 104, § 92; 35 & 36 V., c. 73, § 4.

⁶ 17 & 18 V., c. 104, § 277; 35 & 36 V., c. 73, § 4.

⁷ See, as to Banker's books, 42 V., c. 11, § 7, cited post, § 1608A.

⁸ Ante, § 5.

Parliament roll.¹ In most of the *local and personal Acts* it was customary, prior to the year 1851, to insert a clause, declaring that the Act should be deemed public, and should be judicially noticed: and the effect of this clause was to dispense with the necessity, not only of pleading the Act specially, but of producing an examined copy, or a copy printed by the printer for the Crown.² Since the commencement of the year 1851 this clause, however, has been omitted, the Legislature having enacted that every Act made after that date shall be deemed a public Act, and be judicially noticed as such, unless the contrary be expressly declared.³ The simplest mode of proving those few Acts, whether they be local and personal, or merely private, which, being passed before the year 1851, contain no clause declaring them to be public, or which being passed since that date, contain an express clause, declaring them not to be public, is by producing a copy, which, if it *purports* to be printed by the Queen's printer, or under the superintendence or authority of Her Majesty's Stationery Office,⁴ need not be proved to be so;⁵ or the Act may be proved by means of an examined copy, shown on oath to have been compared with the Parliament roll.⁶ Where the Acts have not been printed by any such authorised printer, as is sometimes the case with respect to Acts for naturalising aliens, for dissolving marriages, for inclosing lands, and for other purposes of a strictly personal character, an examined copy, or a certified transcript into Chancery, if there be one,⁷ furnishes the regular proof.

§ 1524. Before leaving the subject of legislative acts, it may be § 1369 observed that the *statutes passed in Ireland prior to the Union* are conclusively proved in any court of Great Britain by producing a copy of them printed and published by the printer for the Crown; and, in like manner, the copies of the statutes of England and of Great Britain, which have been printed and published by the

¹ R. v. Jeffries, 1 Str. 446.

² Woodward v. Cotton, 1 C. M. & R. 44, 47; Beaumont v. Mountain, 10 Bing. 404. These cases explain, and partially overrule, Brett v. Beales, M. & M. 421.

³ 13 & 14 V., c. 21, § 7.

⁴ 45 V., c. 9, § 2.

⁵ 8 & 9 V., c. 113, § 3, cited ante, § 7.

⁶ B. N. P. 225.

⁷ Roos Barony, Min. Ev. 145 cited Hubb. Ev. of Suc. 613.

government printer, are receivable as conclusive evidence in any court in Ireland.¹

§ 1525. It has been already remarked, that the *statute or written law* of any *foreign nation* cannot be proved in English courts of justice by the production of a copy of the law, however well authenticated; but that, in all cases, it is necessary to call some person, skilled in the foreign law, to prove the existence and meaning of the statute or code on which reliance is placed.² § 1370

§ 1526. *Acts of state* may be proved in various ways, according to the nature of the document. *British treaties* may be proved, by producing either the originals, or copies exemplified under the Great Seal, or examined copies, or copies coming from the government press; but, in this last case, it may be doubtful whether the courts would be satisfied, without proof that the copy was actually printed by the printer for the Crown. *Charters, letters patent*,³ *letters close, grants from the Crown, pardons, and commissions*, will be most conveniently proved by the production of the originals under the Great Seal,⁴ the Privy Seal,⁵ or the Royal Sign-manual; but as these are matters of public record,⁶ they might also, as it seems, be proved by exemplifications under the Great Seal, or by examined copies. It may be further stated with respect to Letters Patent under the Great Seal, that these, being records, are valid before enrolment, and that, whether tendered in evidence in England or in Ireland, they are admissible without any proof of an inquisition, or a warrant or letter from the Crown directing the grant.⁷ § 1371

¹ 41 G. 3, c. 90, § 9. It is presumed that this section would be satisfied by producing a copy which *purported* to be printed by the government printer, without proof that it was actually so printed. The words, however, in their strict sense, do not admit of this construction, and the evil is not remedied by the Docum. Evid. Act, 8 & 9 V., c. 113, cited ante, § 7. See Woodward v. Cotton, 1 C. M. & R. 48. See also 45 V., c. 9, and qu. as to the effect, if any, produced by that Act. ² Ante, §§ 1423—1425.

³ As to proof of patents for inventions, see post, § 1603.

⁴ See "The Great Seal Act, 1884," 47 & 48 V., c. 30; also, 40 & 41 V., c. 41.

⁵ Since 28th July, 1884, no instrument is required to be passed under the Privy Seal; 47 & 48 V., c. 30, § 3.

⁶ Bl. Com. 346.

⁷ D. of Devonshire v. Neill, 2 L. R. Ir., Ex. 132.

§ 1527. Royal Proclamations, and Orders and Regulations issued under the authority of Government, may be proved, like other public documents, by producing either the originals, or examined copies, and in addition to these obvious modes of proof, others have been afforded and defined by “The Documentary Evidence Act, 1868,”¹ as amended by “The Documentary Evidence Act, 1882.”² § 2 of the first-named statute, when read in connexion with § 4 of the last-named, enacts, that “Primâ facie evidence of any proclamation, order, or regulation³ issued before or after the passing of this Act by her Majesty, or by the Privy Council, or by the Lord Lieutenant or other chief governor or governors of Ireland, either alone or acting with the advice of the Privy Council in Ireland, also of any proclamation, order⁴ or regulation, issued before or after the passing of this Act by or under the authority of any such department of the government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:—

“(1.) By the production of a copy of the Gazette⁵ purporting to contain such proclamation, order, or regulation:⁶

“(2.) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer,⁷ or by any printer to her Majesty in Ireland, or by any printer printing either in England or Ireland under the superintendence or authority of Her Majesty’s

¹ 31 & 32 V., c. 37.

² 45 V., c. 9.

³ This Act is made specially applicable to “any regulation made by a Secretary of State in pursuance of” the Naturalisation Act, 1870, 33 & 34 V., c. 14, § 12, subs. 5, and to “any rule made by a Secretary of State” in pursuance of the Prison Act, 1877, 40 & 41 V., c. 21, § 51. As to the proof of the Irish prison rules, see post, § 1663.

⁴ “Any approval of the Treasury” under the Post-office Act, 1870, and “any warrant of the Treasury” under the Post-office Act, 1875, shall be deemed an “order” within this Act; 33 & 34 V., c. 79, § 21; 38 & 39 V., c. 22, § 9.

⁵ See, also, 40 & 41 V., c. 41, § 3, subs. 3. The entire Gazette must be produced a cutting from it will not suffice; *R. v. Lowe*, 15 Cox, 286; 52 L. J., M. C. 122, S. C.

⁶ See, also, the “Contagious Diseases, Animals, Act, 1878,” 41 & 42 V., c. 74, § 58.

⁷ *Huggins v. Ward*, 8 Law Rep., Q. B. 521.

Stationery Office,¹—or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession:

- “(3.) By the production, in the case of any proclamation, order, or regulation issued by her Majesty, or by the Privy Council in England, or by the Lord Lieutenant or his Privy Council in Ireland,² of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connexion with such department or officer.

“Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

“No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.”

§§ 3 and 4,—relating as they do to matters of minor importance,—will be found in the note below.³ § 5 enacts, that “the following

¹ 45 V., c. 9, §§ 2, 4.

² 45 V., c. 9, § 4.

³ Sect. 3 enacts, that, “subject to any law that may be from time to time made by the Legislature of any *British* colony or possession, this Act shall be in force in every such colony and possession.”

Sect. 4 enacts, that “if any person commits any of the offences following, that is to say,

- (1.) Prints any copy of any proclamation, order, or regulation, which falsely purports to have been printed by the government printer, or to be printed under the authority of the Legislature of any *British* colony or possession, or tenders in evidence any copy of any proclamation, order, or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or,
- (2.) Forges, or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorized to be annexed to a copy of or extract from any proclamation, order, or regulation;

he shall be guilty of felony, and shall on conviction be liable to be sentenced

words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such constructions; (that is to say,)

“ ‘British colony and possession’ shall for the purposes of this Act include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in her Majesty, by virtue of any Act of Parliament for the government of India and all other her Majesty’s dominions:

“ ‘Legislature’ shall signify any authority, other than the Imperial Parliament or her Majesty in Council, competent to make laws for any colony or possession:

“ ‘Privy Council’ shall include her Majesty in Council, and the Lords and others of her Majesty’s Privy Council, or any of them, and any committee of the Privy Council that is not specially named in the schedule hereto: also the Privy Council in Ireland or any committee thereof.¹

“ ‘Government printer’ shall mean and include the printer to her Majesty, whether in England or Ireland, and any printer printing either in England or Ireland under the superintendence or authority of Her Majesty’s stationery Office,² and any printer purporting to be the printer authorised to print the statutes, ordinances, acts of state, or other public acts of the Legislature of any British colony or possession, or otherwise to be the government printer of such colony or possession:

“ ‘Gazette’ shall include ‘The London Gazette,’ ‘The Edinburgh Gazette,’ and ‘The Dublin Gazette,’ or any of such gazettes.”

§ 6 enacts, that “the provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law.”

to penal servitude for such term as prescribed by the Penal Servitude Act, 1864, as the least term to which an offender can be sentenced to penal servitude ” (that is, ‘five years,’ see 27 & 28 V., c. 47 § 2), “or to be imprisoned for any term not exceeding two years, with or without hard labour.”

¹ 45 V., c. 9, § 4.

² 45 V., c. 9, §§ 2 & 4.

SCHEDULE AS AMENDED BY SUBSEQUENT LEGISLATION.

COLUMN I. Name of Department or Officer.	COLUMN II. Names of Certifying Officers.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee.
The late Poor-law Board. ¹	Any Commissioner of the Poor-law Board, or any Secretary or Assistant Secretary of the said Board.
The Local Government Board. ²	Any Member of the Local Government Board, or any Secretary or Assistant Secretary of that Board.
The Education Department. ³	Any Member of the Education Department, or any Secretary or Assistant Secretary of that Department.
The Postmaster-General. ⁴	Any Secretary or Assistant Secretary of the Post-office.

§ 1528. All *proclamations, treaties, and other acts of state*, of any *Foreign State* or of any *British Colony*, may be proved either by examined copies, or by copies *purporting* to bear the seal of the state or colony to which they respectively belong.⁵ In one case, where a book was tendered in evidence which purported to be a collection of treaties concluded by America, and was declared to have been published by authority there, as a regular copy of the archives in Washington; and it was further proposed to prove, by the American minister resident at this court, that the book was

¹ Abolished by 34 & 35 V., c. 70, § 2.

² 34 & 35 V., c. 70, § 5. See, also, 38 & 39 V., c. 55, §§ 130, 135, 297, subs. 7; and 41 & 42 V., c. 52, § 265, Ir.

³ 33 & 34 V., c. 75, § 83.

⁴ 33 & 34 V., c. 79, § 21. See, also, 44 & 45 V., c. 20, §§ 6 & 7; and 47 & 48 V., c. 76, § 15.

⁵ 14 & 15 V., c. 99, § 7, cited ante, § 10.

the rule of his conduct; Lord Ellenborough rejected the evidence, observing that he would not have admitted a book of Spanish treaties, though proved to have been printed by the King's printer in that country.¹

§ 1529. The Documentary Evidence Act, of 1845,—as already § 1373 observed,—renders copies of the *Journals* of either House of Parliament admissible in evidence, provided that they *purport* to be printed by the printers of either House; and it is not necessary to prove that the copies were in fact so printed.²

§ 1530. The *Articles of War* for the government of the navy, § 1374 the army, and the marines, are respectively embodied or authorised in public statutes,³ and, consequently, require no proof.⁴ Moreover, the Army Act, 1881, contains what some lawyers may perhaps regard as a needless enactment, providing, that all “copies purporting to be printed by a government printer,” whether of Queen's regulations, including Admiralty regulations so far as concerns the Royal Marines, or of royal warrants, or of army circulars, or of rules made by Her Majesty, or a Secretary of State, in pursuance of that Act, shall be evidence of such regulations, royal warrants, army circulars and rules.⁵ The Military Manœuvres Act, 1882, contains also some special provisions for facilitating the proof of certain orders, regulations, and rules, which the consultative Commission appointed by that statute are authorised to make.⁶

§ 1531. The reports made by the Commissioners or the Surveyor General of the Woods and Forests, either to the Queen or to Parliament, may, by virtue of “The Crown Lands Act, 1873,” be proved by copies purporting to have been printed by the order of either House.⁷ This enactment, though salutary so far as it

¹ *Richardson v. Anderson*, 1 Camp. 65, n. a.

² 8 & 9 V., c. 113, § 3, cited ante, §§ 7, 8.

³ 29 & 30 V., c. 109; 44 & 45 V., c. 58, §§ 69, 179.

⁴ Ante, § 5.

⁵ 44 & 45 V., c. 58, § 163, subs. (c), and § 179, subs. 11,

⁶ 45 V., c. 10, §§ 5, 10.

⁷ 36 & 37 V., c. 36, § 6.

extends, would be much more beneficial, were it rendered applicable to all reports which have been presented either to the Crown or to Parliament.

§ 1532. The judges have promulgated a rule, which must not be lost sight of in any case where an *original record* of the High Court is required to be produced at the trial. The rule is in these words :—"No affidavit or record of the court shall be taken out of the Central Office without the order of a judge or master, and no subpoena for the production of any such document shall be issued."¹ § 1376

§ 1533. The *general records of the realm*, which are placed under the custody of the Master of the Rolls, may be proved by copies purporting to be certified by the deputy-keeper of the records, or one of the assistant record-keepers, and to be sealed or stamped with the seal of the Record Office;² and in cases of importance before the House of Lords or elsewhere, permission will be given to one of the assistant-keepers to produce the original record.³ § 1377

§ 1534. The next class of public documents to be considered consists of the *records of courts of justice*, and other judicial § 1378

¹ Rules of Sup. Ct., 1883, Ord. LXI., R. 28. A somewhat similar rule prevails on the Revenue side of the Queen's Bench Division; see Reg. Gen., 24 V., r. 77, 6 H. & N. xiii.

² 1 & 2 V., c. 94, § 12, enacts, that "the Master of the Rolls or deputy-keeper of the records may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy by the deputy-keeper of the records, or one of the assistant record-keepers aforesaid, and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." § 13 enacts, that "every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there as evidence." For the corresponding enactments in the Public Records, Ireland, Acts, 1867 and 1875, see 30 & 31 V., c. 70, §§ 19, 20, Ir.; 38 & 39 V., c. 59, §§ 9, 10, Ir.

³ See ante, § 1532.

writings. And, first, as to the *records* of the Supreme Court, and of the old *superior courts* of law and equity, and the *quasi records* of those courts. The expression "quasi records" will embrace depositions, affidavits, bills, answers, orders, and decrees, filed in the old Court of Chancery, rules of court, and certain other documents, which, although not strictly records,¹ partake so much of their nature, that they can be proved by means of copies² to the same extent as records, and are subject generally to the same rules of evidence. Indeed, henceforth, for the sake of convenience, the general term "records" will alone be used, and will include all the documents just mentioned. Now, the records of the superior courts may either be proved by the mere production of the *originals*, or,—as this course would be highly inconvenient to the public if generally adopted, since it might lead to the mutilation or loss of valuable documents,—they may also be proved by means of *copies*.³ Of these, there are *four kinds*; viz., exemplifications under the Great Seal; exemplifications under the seal of the particular court where the record remains; office copies; and examined copies.⁴

§ 1535. One or other of these copies will always be admissible in lieu of the original record, *excepting in two cases*:⁵ first, if issue has been joined on a statement of defence or a reply of *nul tiel record*, in some cause in a court to which the disputed record belongs;⁶ and secondly, if a person is indicted for perjury in any affidavit, or deposition, or for forgery with respect to any record.⁷ § 1379

¹ B. N. P. 235. The reason given by Buller, J., in this passage, why the proceedings in Chancery are not records, is sufficiently amusing. After stating that a record is "a memorial of what is the law of the nation," he adds, "now Chancery proceedings are no memorials of the laws of England, because the *Chancellor is not bound to proceed according to the law*. As to rules of court not being records, see *R. v. Bingham*, 3 Y. & J. 109, 112, 114.

² See, as to decrees, B. N. P. 234, 235; as to bills and answers, *Ewer v. Ambrose*, 4 B. & C. 25; as to depositions in Chancery, *Highfield v. Peake*, M. & M. 109; as to affidavits, *Davies v. Davies*, 9 C. & P. 252; *Garvin v. Carroll*, 10 Ir. Law R. 323; as to rules of court, *Selby v. Harris*, 1 Ld. Ray. 745; *Duncan v. Scott*, 1 Camp. 102.

³ Ante, § 439. Post, § 1598.

⁴ B. N. P. 226—228.

⁵ As to a possible third case, see ante, § 1448.

⁶ 2 Ph. Ev. 129.

⁷ B. N. P. 239; *R. v. Morris*, 2 Burr. 1189; *R. v. Benson*, 2 Camp. 508;

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In either of these cases, the original document,—unless it be shown that the prisoner has got possession of it, or that it has been lost or destroyed,¹—must be actually produced. On a trial, too, for perjury, the signatures of the defendant, and of the person whose name is attached to the jurat, must be proved;² after which the court will presume that the oath was duly administered.³ For the purpose of insuring the production of the original record, application should be made to the court to which it belongs, or to a judge or master, who will make the necessary order.⁴

§ 1536. When an issue was raised as to the *existence of a record* § 1380 which did *not belong to the same court*, the proof used to be by an *exemplification under the Great Seal*, in order to obtain which, if the record did not belong to the old Court of Chancery, a literal transcript of it was removed thither by certiorari; for that was regarded as the centre of all the courts, and there the Great Seal was kept. An exemplification was then transmitted by mittimus out of Chancery, to the court in which the cause was pending;⁵ and this seemed to be the proper mode of proof, where the existence of a judgment of one of the superior courts was put in issue in any County Court.⁶ As to what would be the proper mode of proceeding now, “hurly-burly innovation” has made it difficult to determine.

R. v. Spencer, Ry. & M. 97; Crook v. Dowling, 3 Doug. 77; Stratford v. Greene, 2 Ball & B. 296; Garvin v. Carroll, 10 Ir. Law R. 330, per Crampton, J.; Lady Dartmouth v. Roberts, 16 East, 340, per Ld. Ellenborough and Le Blanc, J. In this last case the judges intimated an opinion, that the same strictness was necessary in actions for malicious prosecution; but this would seem to be a mistake. See B. N. P. 13; Purcell v. M’Namara, 1 Camp. 200.

¹ R. v. Milnes, 2 Fost. & Fin. 10, per Hill, J.

² See cases cited in last note but one.

³ R. v. Spencer, 1 C. & P. 260, per Abbott, C. J.; R. v. Turner, 2 C. & Kir. 732, per Erle, J.

⁴ See ante, § 1532; Crook v. Dowling, 3 Doug. 77, per Ld. Mansfield, Bastard v. Smith, 10 A. & E. 214; Bentall v. Sidney, id. 164. The application to the court for leave to take an affidavit off the file, in order to prosecute the defendant for perjury, will be granted as a matter of right. Stratford v. Green, 2 Ball & B. 294; Keinan v. Boylan, 1 Sch. & Lef. 232.

⁵ B. N. P. 226 b.; Hewson v. Brown, 2 Burr. 1034.

⁶ Winsor v. Durnford, 12 Q. B. 603.

§ 1537. When the existence or contents of the record are *not* § 1381
directly in issue it may be always proved by the second kind of exemplification, though practically recourse is seldom had to this medium of proof, where the record belongs to any Division of the Supreme Court. Both species of *exemplifications* are *proved by mere production*, as the judges are bound to take judicial notice of the seals attached to them;¹ and they are deemed of higher credit than examined copies, being presumed to have undergone a more critical examination.² Indeed, an exemplification under the Great Seal is itself considered a record of the highest validity.³

§ 1538. An *office copy* of a record,—by which is meant a copy § 1382
 authenticated by a person intrusted with the power of furnishing copies,—is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and it has ever been regarded, even at common law, as equivalent to the record itself, when it was tendered as evidence in the *same court*, and in the *same cause*.⁴ It has now, however, acquired a far wider admissibility by virtue of the Rules of the Supreme Court, 1883, for Ord. XXXVII., R. 4, provides, that “office copies of all writs, records, pleadings, and documents filed in the High Court shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible.” With respect to *affidavits*, the Rules further provide, that office copies of them, duly authenticated with the seal of the office, may, in all cases, be used, provided the originals have been duly filed,⁵ but the originals may, in some cases, be used before filing,⁶ and an office copy of an affidavit of discovery of documents is not required.⁷

¹ Ante, § 6.

² B. N. P. 226 b, 228.

³ Id.

⁴ Den v. Fulford, 2 Burr. 1179. per Ld. Mansfield; Jack v. Kiernan, 2 Jebb & Sy. 231, 237, 238, per Bushe, C. J.; Barron v. Daniel, Crawf. & D., Abr. C. 283, per Doherty, C. J.

⁵ Ord. XXXVIII., R. 15.

⁶ Id., and Ord. LXV., R. 27, subs. 53.

⁷ Ord. LXV., R. 27, subs. 54.

§ 1539. Under Order LXI., the Central Office of the Supreme Court is now divided, as has already been stated,¹ into ten departments, which are respectively named:—1. Writ, appearance and judgment. 2. Summons and Order. 3. Filing and Record. 4. Taxing. 5. Enrolment. 6. Judgments and Married Women's acknowledgments. 7. Bills of Sale. 8. Queen's Remembrancer. 9. Crown Office. 10. Associates.² Each of these departments has an official seal,³ and in all of them a vast number of documents are filed, enrolled, or otherwise deposited. Rule 7 of the Order then provides, that, "All copies, certificates, and other documents, appearing to be sealed with a seal of the Central Office, shall be presumed to be office copies or certificates or other documents issued from the Central Office, and, if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document."

§ 1540. Independent of this general provision, office copies of some of the records of the Supreme Court and of the Central Office are by statute rendered admissible in evidence in all courts. For example, the certificates of acknowledgments of deeds by married women, which are filed in No. 6 Department of the Central Office, may, by virtue of the Conveyancing Act, 1882,⁴ be proved by office copies. So, when a search has been made, under the same Act, in the Central Office for entries of judgments, deeds, matters or documents, the proper officer must file a certificate setting forth the result of the search; and every such certificate may be proved by an office copy, and shall, in favour of a purchaser, furnish conclusive evidence "according to the tenour thereof," whether affirmative or negative.⁵ So, the orders and decisions of the Court of Appeal from the decisions of *revising barristers* may be proved by copies, though such copies are not strictly "office copies," as they bear no official seal, but must purport to be signed by a master of

¹ Ante, § 1491A, n. 5.

² R. 1.

³ R. 6.

⁴ 45 & 46 V., c. 39, § 7, subs. 7 & 8. See, also, 4 & 5 W. 4, c. 92, § 79, Ir.

⁵ Id., § 2.

the court.¹ Again, any person may, under the Bills of Sale Act, 1878, and on paying the proper fees, have an office copy or extract of any bill of sale registered in the Central Office,² and of the affidavit of execution filed therewith, or of any copy thereof with its accompanying affidavit, or of any registered affidavit of renewal; and any such copy shall, in all courts and before all persons, "be admitted as *prima facie* evidence thereof, and of the fact and date of registration as shown thereon."³

§ 1541. The Act of 12 & 13 V., c. 109, has facilitated the proof of all records and documents belonging to the old common-law side of the Court of Chancery, and filed or deposited in the Petty Bag Office, by making office copies of them admissible in evidence; and after enacting, in § 11, that the Chancery Common-law Seal shall be judicially noticed; it goes on to enact, in § 13,⁴—with tautology which would put to shame Mrs. Shandy's marriage-settlement,⁵—that every document sealed with this seal, and purporting to be a copy of any record or document, shall be deemed to be a true copy, and shall, without further proof, be admitted in evidence before all courts and persons, to the same extent as the original record or document would be admissible, as well for the purpose of proving its contents, as of proving that it belonged to the Court of Chancery. § 1385

¹ See 6 & 7 V., c. 18, §§ 66, 68. See as to corresponding law in Ireland, 13 & 14 V., c. 69, §§ 79, 81, Ir.

² Ord. LXI., R. 1.

³ 41 & 42 V., c. 31, § 16; 42 & 43 V., c. 50, § 16, Ir. See *Halkett v. Emmott*, 47 L. J., Q. B. 436; S. C., nom. *Emmott v. Marchant*, *Halkett*, Claimant, L. R. 3 Q. B. D. 555.

⁴ The precise words are as follows:—"And be it enacted, that every office copy issued from the Petty Bag Office shall be sealed with the said Chancery Common-law Seal for the time being; and every document sealed with such seal, and purporting to be a copy of any record or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be admissible and admitted and received in evidence, as well before either House of Parliament as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, officers, and other persons whomsoever, in like manner and to the same extent and effect as the original record or other document would or might be admissible or admitted or received, if tendered in evidence, as well for the purpose of proving the contents of such record or other document, as also proving such record or other document to be a record or document, of or belonging to the said Court of Chancery, but not further or otherwise."

⁵ *Tristram Shandy*, Vol. I. ch. xv.

§ 1542. It would be no easy matter to enumerate all the records and documents which are deposited in the Petty Bag Office,¹ and which may now, under the above enactment, be proved by office copies; but among the most important may be mentioned the Parliament pawns, that is, the list of writs issued on calling new Parliaments, from the time of Henry VII.; the returns of Members to Parliament from the date of the Restoration; a few qualifications of Members of Parliament; The Bedford Level decrees; the decrees of Charity Commissioners from the reign of Queen Elizabeth; the commissions and inquisitions of lunacy and escheats from the time of Charles II.; the returns to writs for swearing in the old Masters Extraordinary of the Court of Chancery, and justices of the peace, and for electing coroners, verderors, and regardors; the returns to writs of scire facias, and a vast number of other writs which have issued from what used to be the common-law side of the Court of Chancery;² and a considerable number of enrolments of patents and specifications, which, prior to the 1st of January, 1849, were enrolled in the Petty Bag Office. § 1380

§ 1543. While treating of office copies it will be proper to draw attention to an extraordinary provision which has, by some strange oversight, crept into the rules which regulate proceedings in divorce and matrimonial causes. All documents relating to any matter or suit depending in the Court for Divorce and Matrimonial Causes are now, in accordance with rule 118, deposited in the Registry of the Court of Probate; and the Registrar of that court is bound to permit searches and inspection, and to grant copies and extracts, as if the documents had reference to some disputed probate. Then comes Rule 119, which provides that "*office copies* or extracts furnished from the Registry of the Court of Probate will *not be collated* with the originals from which the same are copied, unless specially required. Every copy so required shall be certified under

¹ See 37 & 38 V., c. 81, §§ 5, 10, which give power to abolish this office, and to transfer the muniments elsewhere. For some unexplained reason, however, the power has never been exercised. See Rules respecting Solicitors, 2nd Nov., 1875, Rule "as to Custody of Rolls and Documents."

² See 12 & 13 V., c. 109, § 14.

the hand of one of the principle Registrars of the Court of Probate to be an examined copy." Rule 120 adds, that "the seal of the court will not be affixed to any copy which is not certified to be an examined copy." It would be difficult to frame language opening a wider door to fraud than that here employed. Let the reader only imagine one of the most important Divisions of the Supreme Court of Justice in this country being permitted to issue out to the public,—doubtless for fees duly received,—what might turn out to be false extracts from, and fraudulent copies of, some of the most important records we possess. It is hoped that attention being now drawn to this grave blot, it will no longer be allowed to disgrace our Judicature Rules.

§ 1544. Although, in Ireland, the officers of the superior courts are authorised, if not required, by statute,¹ to furnish office copies of the proceedings of such courts, these copies, with one statutory exception, seem to be admissible in evidence only in the same cause and the same court; the judges apparently considering, that the Legislature did not intend to effect such an innovation in the law of evidence, as would be introduced, if office copies of all the records of the superior courts were rendered universally admissible.² The exception just stated is founded on the Act of 14 & 15 V., c. 57, Ir., which, by § 107, enacts, that in every proceeding before the court of the assistant barrister, or of the judge of assize upon appeal, an *office copy* of any judgment, decree, or order, made by or before any court of law or equity in Ireland, *certified to be a true copy* by the proper officer of such court, shall, *upon proof of such officer's handwriting*, be deemed and taken as *prima facie* evidence of such document. This clause is remarkable, as setting at naught the valuable provisions of the Documentary Evidence Act, so far as relates to the proof of the office copies. § 1388

§ 1545. The most usual mode of proving records is by an § 1389

¹ See 7 & 8 V., c. 107, § 11, and Sch., Ir.

² *Jack v. Kiernan*, 2 Jebb & Sy. 231.

examined copy; and when this course is intended to be adopted, a witness must be produced, who will swear that he has compared the copy tendered in evidence with the original, or with what the officer of the court, or any other person, read as the contents of the record, and that such a copy is correct.¹ It is not necessary for the person examining to exchange papers, and read them alternately both ways;² but it is necessary that the copy should be an accurate and complete copy, and, therefore, if it contains abbreviations where, in the original, words were written at length, it cannot be received.³ Moreover, if the record be written or printed in an ancient or foreign character, the witness, who has compared the copy with it, must have been able to read and understand the original.⁴ It must also appear in all these cases, that the record from which the copy was taken was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept. And this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found.⁵

§ 1546. The records of judicial proceedings of the old Admiralty Court,⁶ of the Ecclesiastical Courts,⁷ of the Court of Stannaries,⁸ and of the Courts of Quarter Sessions, may be proved, either by producing the originals, or by means of exemplifications, whether under the Great Seal or under the seals of the respective courts, which seals require no proof,⁹ or by office copies in the same cause and the same court,¹⁰ or by examined copies in any court.¹¹ Indeed, these modes of proof are generally available with respect to the

¹ *Reed v. Margison*, 1 Camp. 469; *Gyles v. Hill*, id. 471, n.; *M'Neil v. Perchard*, 1 Esp. 264; *Fyson v. Kemp*, 6 C. & P. 71; *Rolf v. Dart*, 2 Taunt. 51; *R. v. M'Donald*, Arm. M. & O. 112, per Crampton, J.; *R. v. Hughes*, 1 Crawf. & D., C. C. 13, per Doherty, C. J.; *Hill v. Packard*, 5 Wend. 387; *Lynde v. Judd*, 3 Day, 499.

² Cases cited in last note.

³ *R. v. Christian*, C. & Marsh. 388.

⁴ *Crawford and Lindsay Peer*, 2 H. of L. Cas. 534, 544, 545.

⁵ *Adamthwaite v. Synge*, 1 Stark. R. 183, per *Ld. Ellenborough*; 4 Camp. 372, S. C.

⁶ See 3 & 4 V., c. 65; 24 & 25 V., c. 10; 30 & 31 V., c. 114, Ir.

⁷ See 6 & 7 V., c. 38, § 14.

⁸ See 6 & 7 W. 4, c. 106, §§ 19, 21.

⁹ *Ante*, § 6.

¹⁰ *Ante*, § 1538.

¹¹ *R. v. Hains*, Comb. 337, per *Holt*, C. J. (4190)

judgments or other proceedings of all inferior courts of record;¹ and even where the court is not one of record, and where short notes of its proceedings are alone kept, these notes, being considered as public documents, may be proved by examined copies.² Where the existence of a record or judgment of any of the inferior common-law courts is put in issue in some cause in the Queen's Bench Division, the party who has to produce the document questioned, may move that court for a certiorari; and on the issuing of this writ, a literal transcript of the document, under the seal of the inferior tribunal, will be returned directly into the court, and will be sufficient to countervail the statement of defence denying the existence of the original.³

§ 1547. In extending to the records and other judicial pro- § 1391
ceedings of all inferior courts the above common-law modes of proof, it must not be forgotten that, in a few instances, special statutes have been passed with a view of *facilitating the proof*, either of the records or other proceedings of *particular tribunals*, or of *particular records and documents*. These Acts, however, by rendering admissible a convenient species of evidence, do not thereby deprive parties of the right of having recourse to any other mode of proof allowable at common-law; or, in other words, the *statutable methods of proof are cumulative*, and *not substitutionary*; since it is a doctrine founded on common sense, largely sanctioned by authority, and especially applicable where the common law is concerned, that, unless the enactment of a new provision clearly indicates an intention by the Legislature to abrogate the old law, both shall be understood to stand together, provided their so doing would not be impossible or obviously absurd.⁴

§ 1548. Subject to these observations, a reference may now be § 1392
made to the Acts in question; and, first, as to "The Bankruptcy

¹ R. v. Hains, Comb. 337, per Holt, C. J.

² Id.

³ Woodcraft v. Kinaston, 2 Atk. 317, 318, per Ld. Hardwicke; Butcher's case, Cro. Eliz. 821.

⁴ Escott v. Mastin, 4 Moo. P. C. R. 130, 131, per Ld. Brougham; Northam v. Latouche, 4 C. & P. 140, per Tindal, C. J.; R. v. Carter, 1 Den. 65; Edwards v. Buchanan, 3 B. & Ad. 788.

Act, 1883,"¹ which regulates in great measure the proof of the proceedings of the *Courts of Bankruptcy*.² This statute enacts, in § 134,³ that "any petition or copy of a petition in bankruptcy, any order⁴ or certificate, or copy of an order or certificate, made by any court having jurisdiction in bankruptcy, any instrument, or copy of an instrument, affidavit, or document, made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever."

§ 1549. Besides this general enactment, the Act, and the Rules made pursuant to § 127, contain several provisions, which facilitate the proof of particular documents, and enlarge their admissibility and effect. First, "A copy of the London Gazette, containing any notice inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice."⁵ These notices,—which must all

¹ 46 & 47 V., c. 52. As to "The Bankruptcy (Scotland) Act, 1856," see post, § 1559.

² The Irish Bankrupt and Insolvent Act, 1857, 20 & 21 V., c. 60, enacts in § 361, that "every petition of bankruptcy, petition of insolvency, schedule, adjudication, petition for arrangement between a debtor and his creditors, appointment of assignees, certificate, deposition, order, document or other proceeding in bankruptcy or insolvency, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, without any further proof thereof; provided always, that all commissions of bankrupt, depositions, and other proceedings under the same, which may have been entered of record before the commencement of this Act, and having the certificate of entry thereon, purporting to be signed by the person appointed to enter the same by the Act of the Irish Parliament, 11 & 12 G. 3, c. 8, and the Act 6 & 7 W. 4, c. 14, or his deputy, shall, without proof of the appointment or handwriting of such person, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place."

³ See as to the former law, 24 & 25 V., c. 134, § 203; 32 & 33 V., c. 71, § 107.

⁴ *R. v. Thomas*, 11 Cox, 535, as to orders of adjudication.

⁵ § 132, subs. 1.

be gazetted by the Board of Trade,¹—are ten in number,² and relate to, (1) Receiving orders; (2) First meetings; (3) Adjudications; (4) Approvals of compositions or schemes; (5) Intended dividends; (6) Dividends; (7) Applications for discharge; (8) Adjudications annulled; (9) Appointments of Trustees, and (10) Orders on application for discharge. The Act next singles out two of these notices for special favour, and enacts in § 132, subs. 2, that “the production of a copy of the London Gazette containing any notice of a receiving order,³ or of an order adjudging a debtor bankrupt,⁴ shall be *conclusive* evidence in all legal proceedings of the order having been duly made, and of its date.”

§ 1550. Again, the appointment of a trustee in a bankruptcy, and probably of a trustee when appointed in a composition, or a scheme of arrangement,⁵ will be *conclusively* proved by producing the certificate of the Board of Trade, declaring him to be such trustee.⁶ The appointment, too, of all official receivers, and assistant official receivers, by the same Board must be *judicially noticed*;⁷ and a certificate of the official receiver that a composition or scheme has been duly accepted by the creditors and approved by the court, is, “in the absence of fraud, *conclusive* as to its validity.”⁸

§ 1551. On hearing any application for the discharge of a bankrupt the court is now required to “take into consideration a report of the official receiver as to the bankrupt’s conduct and affairs;” and for the purposes of this inquiry, the report is to be received,—contrary to the ordinary rules of justice,—as “*prima facie* evidence of the statements therein contained.”⁹ So, when the Board of Trade has objected to the appointment of a trustee, and at the instance of the creditors has notified the objection to the High

¹ R. 203. But see Sched. I., R. 2, which directs the official receiver to gazette the notices of first meetings, and compare it with R. 185 of the Bankruptcy Rules.

² F. 127.

³ § 13.

⁴ § 20, subs. 2.

⁵ See § 18, subs. 12 & 13.

⁶ § 138; R. 218; F. 71.

⁷ RR. 233, 242.

⁸ § 18, subs. 9.

⁹ § 28, subs. 2 & 4.

Court, any report of the grounds of the objection, when communicated by the board to the court, must be received as "prima facie evidence of statements therein contained."¹

§ 1552. Again, under Schedule 1 of the Act, Rule 25, the chairman² of every meeting of creditors is directed to "cause minutes of the proceedings at the meeting to be drawn up, and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting;" and § 133, subs. 1 of the Act then provides, that any such minute, "signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof." Subs. 2 further enacts,—and this is a very valuable enactment,³—that, "until the contrary is proved, every meeting of creditors, in respect of the proceedings whereof a minute has been so signed, shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had."

§ 1553. The Act also contains an important regulation respecting affidavits; for it enacts by § 135, that, "subject to general rules, any affidavit to be used in a bankruptcy court may be sworn before any person authorised to administer oaths in the High Court, or in the Court of Chancery of the County Palatine of Lancaster, or before any registrar of a bankruptcy court, or before *any officer of a bankruptcy court authorised in writing on that behalf by the judge of the court*, or, in the case of a person residing in Scotland or in Ireland, before a judge ordinary, magistrate, or justice of the peace, or, in the case of a person who is out of the kingdom of Great Britain and Ireland, before a magistrate, or justice of the peace, or other person qualified to administer oaths in the country where he

¹ R. 220, subs. 1 & 2.

² The chairman has prima facie authority to decide all incidental questions requiring immediate decision, and his decision as entered on the minutes is prima facie correct; *In re Indian Zoedone Co.*, 53 L. J., Ch. 468, per Ct. of App.; L. R. 26 Ch. D. 70, S. C.

³ See Bankruptcy Rules, 1883, R. 161, subs. 1.

resides (he being certified to be a magistrate, or justice of the peace, or qualified as aforesaid, by a British minister or British consul, or by a notary public)." Rule 50 of the Bankruptcy Rules then provides, that "the court shall take *judicial notice* of the seal or signature of any person, authorised by or under the Act to take affidavits, or to certify to such authority."¹

§ 1554. A simple mode of proving the records and proceedings² § 1396 of the County Courts³ is established by the Statute 9 & 10 V. c. 95, which, in § 111, enacts, "that the clerk," now called the registrar,⁴ "of every court holden under this Act, shall cause a note of all complaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk," or registrar, "of the court, shall at all times be admitted in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding,⁵ without any further proof." It has been held under this section, that the note entered by the Registrar of the County Court in his book cannot be contradicted by any entry made by the judge in his own minute book.⁶

§ 1555. Among the particular judicial documents the proof of § 1397 which is facilitated by statute, may be mentioned the proceedings

¹ See further as to the proof and admissibility of particular proceedings in bankruptcy, post §§ 1747, et seq.

² See post, § 1586 A.

³ As to the mode of proving Civil Bill decrees in Ireland, see and compare 14 & 15 V., c. 57, §§ 10, 97, 110, 114; 27 & 28 V., c. 99, § 57, cited post, § 1572; *Alcorn v. Larkin*, Arm. M. & O. 367; and *Donagh v. Bergin*, id. 284.

⁴ 19 & 20 V., c. 108, § 8.

⁵ As, for instance, the regularity of the appointment of a deputy judge, *R. v. Roberts*, 14 Cox, 101.

⁶ *Dews v. Ryle*, 2 L. M. & P. 544.

of courts-martial, which, by virtue of the Army Act, 1881, are rendered admissible in evidence on their mere production, if purporting to be signed by the President, and coming from the custody of the Judge Advocate-General, or of the officer having charge of them; and which may also be proved by copies purporting to be certified by such judge-advocate, or his deputy, or by such other officer as aforesaid.¹ Again, all summary convictions for offences against the Seamen's Clothing Act, 1869,² or the Factory and Workshop Act, 1878,³ all of which must be filed amongst the records of the Quarter Sessions, may respectively be proved upon any future proceedings under these Acts, by copies certified under the hand of the Clerk of the Peace. Under the Act of 1861 and 1869, just mentioned, the summary convictions may also be established in evidence by any copies proved to be true, and they will further "be presumed to have been unappealed against until the contrary be shown."⁴ In every case, too, where the conviction is quashed on appeal, the Clerk of the Peace is directed to indorse on it a memorandum to that effect; "and whenever any copy or certificate of such conviction shall be made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction has been quashed."⁵ Again, the verdicts and judgments in compensation cases under the Lands Clauses Consolidation Act, must be signed by the sheriffs, and deposited with the records of the Quarter Sessions; and the same, or copies thereof signed and certified to be true copies by the Clerk of the Peace, are good evidence in all courts and elsewhere.⁶ Under the Customs Consolidation Act, 1876, "Condemnation by any justice under the customs laws, may be proved in any court of justice, or before any competent tribunal, by the production of a certificate of such condemnation, purporting to be signed by such

¹ 44 & 45 V., c. 58, § 165.

² 32 & 33 V., c. 57, § 6.

³ 41 V., c. 16, § 92.

⁴ 32 & 33 V., c. 57, § 6. See 42 & 43 V. c. 49, § 31, subs. 6, and 47 & 48 V., c. 43, § 6.

⁵ See 42 & 43 V. c. 49, § 31, subs. 6, and 47 & 48 V. c. 43, § 6.

⁶ 8 & 9 V., c. 18, § 50.

justice, or an *examined* copy of the record of such condemnation *certified* by the clerk to such justice.”¹

§ 1556. The modes of authenticating the records and judicial proceedings of *foreign and colonial courts*, including those of the Channel Islands, India, and all other possessions of the British Crown, except Scotland,² are now regulated by Lord Brougham’s Evidence Act of 1851,³ which in § 7 enacts, that all judgments, decrees, orders, and other judicial proceedings of any court of justice in any Foreign State, or in any British Colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved either by examined copies, or by copies authenticated as follows : that is to say, they must purport either to be sealed with the seal of the court to which the originals belong; or if there be no seal, to be signed by one of the judges of such court, who must also certify to the fact of there being no seal. When these provisions are complied with, no evidence is required either to authenticate the seal, signature, or certificate attached to the copy, or to prove the official character of the judge. If the foreign document, sought to be proved by a copy, does not fall within the language of the section just cited, evidence must be given that it is a public writing deposited in some registry or place, whence, by the law or the established usage of the country, it cannot be removed,⁴ and the copy must then be shown to have been duly examined. § 1398

§ 1557. Besides the section just referred to, Lord Brougham’s Act⁵ contains several clauses which greatly facilitate the proof of English documents in Ireland, of Irish documents in England, and of English and Irish documents in the Colonies. Thus, § 9 enacts, that “every document, which, by any law now in force or hereafter § 1399

¹ 39 & 40 V., c. 36, § 263. The draftsman of this clause had evidently very hazy notions respecting the distinction between examined and certified copies.

² 14 & 15 V., c. 99, §§ 18, 19.

³ 14 & 15 V., c. 99, § 7, cited ante, § 10.

⁴ *Alivon v. Furnival*, 1 C. M. & R. 277, 291, 292; *Furnell v. Stockpoole*, Milw. Ec. Ir. R. 283—286.

⁵ 14 & 15 V., c. 99.

to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." § 10 enacts, that "every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." § 11 enacts, that "every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales or Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British Colonies, or before any person having in any of such colonies, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

§ 1558. In conformity with § 10, as quoted above, it has been held, that an affidavit purporting to be sworn before a Master Extraordinary of the old Court of Chancery in Ireland, was admissible

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in evidence in this country, without proof of the signature or official character of such master.¹

§ 1559. Several clauses are inserted in "The Bankruptcy (Scotland) Act, 1856,"² to facilitate the proof, and to regulate the effect, of certain proceedings under that statute, which may be tendered in evidence before English or Irish tribunals. One very important section, relative to the mode of proving orders and decrees made under the Scotch Bankruptcy Law, has been cited in an earlier chapter of this work,³ and two or three more remain to be noticed. And first, § 47 enacts, that "the warrant granting protection or liberation [to the debtor], or a copy thereof, certified by one of the Bill Chamber Clerks if it is granted by the Lord Ordinary, or by the Sheriff Clerk if it is granted by the Sheriff, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and her Majesty's other dominions, for civil debt contracted previous to the date of sequestration; and all courts of justice and judges, and all officers and gaolers, shall be bound to give effect to such warrant; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of apprehension or imprisonment, in *meditatione fugæ*, or *ad factum præstandum*, or for any criminal act"⁴ Next, §§ 140 and 147 respectively enact, that the deliverance pronounced by the Lord Ordinary or the Sheriff, "discharging the bankrupt of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," "shall operate as a complete discharge and acquittance to the bankrupt in terms thereof, and shall receive effect within Great Britain and Ireland and all her Majesty's other dominions." Then comes section 73, which enacts, that the act and warrant,⁵ which is granted by the Sheriff in confirmation of the

¹ In re Mahon's Trust, 9 Hare. 459.

² 19 & 20 V., c. 79.

³ § 174 of the Act, cited ante, § 13.

⁴ See, also, § 77 of the Act, which gives powers for renewing the warrant of protection.

⁵ The form of the Act and Warrant is given in Sch. D. of the Statute, and is as follows:

"Act and Warrant of Confirmation of the Trustee.

[Place and date.]

"The Sheriff of the county of [insert county] has confirmed and hereby

trustee of a sequestrated estate, and which vests in the trustee the whole property of the debtor,¹ "shall be an effectual title to the trustee to perform the duties hereby imposed on him, and shall be evidence of his right and title to the sequestrated estate for the purposes of this Act; and a copy of such act and warrant in favour of the trustee, purporting to be certified by the Sheriff Clerk, and to be authenticated by one of the judges of the Court of Sessions, shall be received in all courts and places within England, Ireland, and her Majesty's other dominions, as *prima facie* evidence of the title of the trustee, without proof of the authenticity of the signatures or of the official character of the persons signing, and shall entitle the trustee to recover any property belonging or debt due to the bankrupt, and to maintain actions in the same way as the bankrupt might have done if his estate had not been sequestrated."

§ 1560. The Legislature has interposed a special mode of § 1401 proving some particular documents, when tendered in evidence as coming either from abroad, or from some place out of the jurisdiction of the court. For instance, the Extradition Act, 1870,² contains an express enactment, in § 14, that "Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act." § 15 then further enacts, that "Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall

confirms A. B. [name and designation], trustee on the sequestrated estate of C. D. [name and designation]; and the whole of the estates and effects, heritable and moveable, and real and personal, wherever situated of the said C. D., are transferred and belong to A. B. as trustee for behoof of the creditors of the said C. D. in terms of the 'Bankruptcy [Scotland] Act, 1856;' and the said A. B. has, as trustee aforesaid, in terms of the said Act, full right and power to sue for and recover all estates, effects, debts, and money belonging or due to the said C. D.

(Signed) C. D., Sheriff Clerk."

¹ § 102.

² 33 & 34 V., c. 52.

be deemed duly authenticated for the purposes of this Act, if authenticated in manner provided for the time being by law, or authenticated as follows:—

“(1.) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;

“(2.) If the depositions, or statements, or the copies thereof, purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require; and

“(3.) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice, or some other minister of state; and all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.”¹

§ 1561. When depositions have been duly authenticated under the Act just cited, no objection, as it would seem, can be urged against their admissibility, on the ground that they were not taken in the presence of the accused or in relation to the particular charge.² All the above provisions relating to depositions extend to affirmations taken in a Foreign State, and to copies of such affirmations.³

§ 1562. Again, the Fugitive Offenders Act, 1881, which author- § 1401A
ises the apprehension, committal, and return, of certain offenders, who have escaped from one part of her Majesty's dominions into another, enacts, that “depositions, whether taken in the absence of

¹ See *R. v. Ganz*, 51 L. J., Q. B. 419; L. R., 9 Q. B. D. 93, S. C.

² In *re Counhaye*, 8 Law Rep., Q. B. 410; 42 L. J., Q. B. 217, S. C.

³ 36 & 37 V., c. 60, § 4.

the fugitive, or otherwise, and copies thereof, and official certificates of, or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under that Act,"¹ that is, in all proceedings before the committing magistrate. The statute then gives minute directions as to what shall constitute due authentication of these several documents,² and adds a proviso, that nothing in the Act shall authorise the reception of any of them in evidence "against a person upon his trial for an offence."³ So, the Acts of 11 & 12 V., c. 42, and c. 43,—which contain provisions for apprehending offenders who escape from one part of the United Kingdom to another, or from one county or place in England to another, and which empower any magistrate of the place to which an offender is supposed to have escaped to back the warrant for his apprehension,—appear to render it necessary, as a preliminary step towards giving such magistrate jurisdiction, that proof should be made on oath of the handwriting of the justice issuing such warrant.⁴

§ 1563. Again, depositions taken under a writ of mandamus § 1402 from the Queen's Bench Division, either in India, respecting misdemeanors committed in that country, or in any place belonging to her Majesty out of the United Kingdom, respecting offences against the Acts for the abolition of the slave trade, may be read as evidence in that Division, on the trial of any indictment or information for these respective crimes, if they have been duly taken, and have also been returned to that Division, closed up and under the seal of two of the judges of the foreign court.⁵

§ 1564. With the view, as it would seem, of facilitating the § 1403 proof of crime committed either at sea or abroad, a clause has been inserted in the Merchant Shipping Act, 1854,⁶ which evinces,

¹ 44 & 45 V., c. 69, § 29.

² Id.

³ Id.

⁴ See §§ 11—15 of 11 & 12 V., c. 42; and § 3 of 11 & 12 V., c. 43.

⁵ 13 G. 3, c. 63, § 40; 6 & 7 V., c. 98, § 4; ante, §§ 500—505. As to how far it is necessary to prove that they have been duly taken and returned, see *R. v. Douglas*, 13 Q. B. 42.

⁶ 17 & 18 V., c. 104, § 270. As to the proof, admissibility, and effect of depositions taken in French ports with respect to offences under "The Sea Fisheries Act, 1868," see 31 & 32 V., c. 45, § 61, & Sched. 1, Art. 28; 46 & 47 V., c. 22, § 30, 2 (d).

like many other legislative efforts, more zeal than knowledge. The object of the enactment is to render such depositions as may have been taken abroad admissible in evidence, when the witness cannot be found within the jurisdiction of the court where the trial is to take place. The language employed is as follows:—"Whenever in the course of any legal proceedings instituted in any part of her Majesty's dominions before any judge or magistrate, or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceedings, then, upon *due proof*,¹ if such proceeding is instituted in the United Kingdom, that such witness cannot be found in that Kingdom, or if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject matter before any justice or magistrate in her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence subject to the following restrictions; that is to say, 1. If such a deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom: 2. If such a deposition was made in any British possession, it shall not be admissible in any proceeding instituted in the same British possession: 3. If the proceeding is criminal, it shall not be admissible unless it was made in the presence of the person accused: Every deposition so made as aforesaid shall be authenticated by the signature of the judge, magistrate, or consular officer, before whom the same is made; and such judge, magistrate, or consular officer shall, when the same is taken in a criminal matter, certify, if the fact is so, that the accused was present at the taking thereof, but it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition: and in any criminal proceeding such certificate as aforesaid shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified;² but nothing herein contained shall affect any case in which

¹ See *R. v. Conning*, 11 Cox, 134; *R. v. Anderson*, id. 154.

² See *R. v. Stewart*, 13 Cox, 296.

depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or ordinance of the Legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial Legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible."

§ 1565. The Common Law Procedure Act of 1852 contains a remarkable, and, as some persons may consider, an absurd, provision with respect to the mode of proving such affidavits as shall be sworn abroad, for the purpose of enabling the courts to direct proceedings to be taken against defendants resident out of the jurisdiction. After enacting that these affidavits may be sworn before any consul-general, consul, vice-consul, or consular agent appointed by her Majesty at any foreign port or place; it goes on to provide, that "every affidavit so sworn by virtue of this Act, may be used, and shall be admitted in evidence, saving all just exceptions, *provided* it *purport* to be signed by such consul-general, consul, vice-consul, or consular agent, *upon proof of the official character and signature* of the person appearing to have signed the same."¹

§ 1566. The above enactment not only violates the principle of the Documentary Evidence Act of 1845,² but it affords a strange contrast to Order XXXVIII., R. 6, of the Rules of 1883,³ which, after regulating the mode of swearing and taking examinations, affidavits, and other documents,⁴ whether in her Majesty's foreign dominions, or in any foreign parts, goes on to provide that

¹ 15 & 16 V., c. 76, § 23. This sect., for some funny reason, has been specially allowed to survive the almost total repeal of the Act by 46 & 47 V., c. 49.

² See ante, § 7.

³ Cited ante, § 12.

⁴ Under these general words, a power of attorney executed in the British Honduras in the presence of a notary-public, has been proved in a Court of Equity by the production of the notary's certificate under his hand and official seal. *Armstrong v. Stockham*, 24 L. J., Ch. 176, per Stuart, V.-C. See, also, *Hayward v. Stephens*, 36 L. J., Ch. 135.

the seal or signature of the court, judge, notary, consul, or other person, attached¹ to such documents, shall be *judicially noticed*.²

§ 1567. The rule referred to in this last section, so far as it § 1406 relates to British diplomatic and consular agents, would seem to contain needless provisions; for the Acts of 18 & 19 V., c. 42,—extending the provisions of 6 G. 4, c. 87, § 20, which empowers consuls-general and consuls to administer oaths and to do notarial acts in the foreign places to which they are appointed,—enacts, in § 1, that it shall be lawful “for every British ambassador, envoy, minister, chargé d’affaires, or secretary of embassy or legation, exercising his functions in any foreign country, and for every British vice-consul, acting consul, pro-consul, or consular agent (as well as every consul-general or consul), exercising his functions in any foreign place, whenever he shall be thereto required, and whenever he shall see necessary, to administer in such foreign country or place any oath, or to take any affidavit or affirmation from any person whomsoever, and also to do and perform in such foreign country or place all and every notarial acts or act which any notary-public could or might be required, and is by law empowered, to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such ambassador, envoy, minister, chargé d’affaires, secretary of embassy or of legation, vice-consul, acting consul, pro-consul, or consular agent, shall be as good, valid, and effectual, and shall be of like force and effect to all intents and purposes, as if such oath, affidavit, or affirmation, or notarial act, respectively, had been administered, sworn, affirmed, had or done before any justice of the peace

¹ In *Haggitt v. Ineff*, 24 L. J., Ch. 120; 5 De Gex, M. & G. 910, S. C.; the Lds. Js. received an affidavit, which was sworn in the United States before, and attested by, a notary-public, and to which was appended a certificate of the British consul at New York, stating that the notary held that office, and that his signature was entitled to credit. See, also, *Savage v. Hutchinson*, 24 L. J., Ch. 232; *Levitt v. Levitt*, 2 Hem. & M. 626; and *Lyle v. Ellwood*, 15 Law Rep., Eq. 67; 42 L. J., Ch. 80, S. C. nom. *Lyle v. Elwood*. But see *In re Earl's Trusts*, 4 Kay & J. 300, cited ante, at end of n. 8, p. 11.

² See, also, 15 & 16 V., c. 86, § 22; and 46 & 47 V., c. 52, § 135, and R. 50 of Bkptcy. Rules, cited ante, § 1552.

or notary-public in any part of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature.”¹

§ 1568. § 2 enacts, that “affidavits and affirmations, so taken as § 1406A
aforesaid under the said Act of King George the Fourth or this Act, shall and may be received, read, and made use of in and before any court of law or equity, or other judicature whatever in any part of the United Kingdom, and the judges and officers thereof, in or in relation to any action, suit, cause, matter or proceeding in or before any such court or judicature, in like manner, and shall be of the same force and effect, as affidavits and affirmations taken in or before such court or judicature, or by any person duly commissioned or authorised by such court or judicature to take such affidavits or affirmations, and shall be filed and dealt with accordingly.”²

§ 1569. As the object of all these statutes was not to abrogate the old law, but to facilitate the administration of oaths abroad, the courts have determined, that a strict compliance with them is not always necessary, but that it will suffice if an affidavit taken abroad can be proved to have been sworn before some functionary, who was able to administer an oath in his own country.³

§ 1570. Before any document, whether an original or a copy, can § 1407
be received in evidence of a judicial proceeding, it must in general appear that the record or entry of such proceeding has been *finally completed*. For instance, in order to prove the finding of an indictment, either at the Assizes or Sessions, it will not be sufficient to produce the indictment itself indorsed a true bill, or the minute-book of the Clerk of the Peace, or other officer of the court, in

¹ See *In re Lambert*, 35 L. J., Pr. & Mat. 64. This case seems to overrule *In re Barnard*, 31 L. J., Pr. & Mat. 89; 2 Swab. & Trist. 489, S. C.

² See ante, § 11, as to §§ 3, 4, & 5 of this Act. The above provisions, somewhat enlarged, are made applicable to affidavits, declarations, and affirmations, used in the Probate and Divorce Divisions, either for England or Ireland, from persons residing in foreign parts out of her Majesty's dominions, by § 31 of 21 & 22 V., c. 95; § 20 of 21 & 22 V., c. 108; and § 16 of 34 & 35 V., c. 49, Ir.

³ *Kevan v. Crawford*, 45 L. J., Ch. 658.

which that fact is entered; but the record must be formally drawn up, and proved in the regular way.¹ So a judgment, whether interlocutory or final, of any Division of the Supreme Court, cannot be proved by producing the minutes, from which it is to be made up, for, until it is actually made up, the judgment is no record.² So, a verdict cannot, in general, be proved by putting in the *Nisi Prius* record with the *postea* indorsed, but a copy of the judgment rendered upon it must be produced; for it may be that the judgment was arrested, or that a new trial was granted.³ If the record itself be produced from the proper custody, it seems that no objection can be taken to it, on the ground that it has not yet been filed.⁴

§ 1571. In stating that the formal record must generally be proved, it is not meant, as has sometimes been imagined,⁵ that the record *must* be enrolled *at full length* on *parchment*. It is true that in the superior courts this practice has long been established, but in several other courts a more simple, or, it may be, a more slovenly method of making up records, and entering proceedings, prevails. Thus, in the House of Lords itself, the minutes of a judgment on the Journals constitute the judgment itself, and a judgment of that High Court may, consequently, be proved, either by an examined copy of the minute,⁶ or by producing a copy of the Journal in which it is entered, purporting to be printed by the authorised printer.⁷ So, the orders of Quarter Sessions respecting the removal of paupers may be proved by the

¹ *R. v. Smith*, 8 B. & C. 341; *Porter v. Cooper*, 6 C. & P. 354; *Cooke v. Maxwell*, 2 Stark. R. 183; *R. v. Thring*, 5 C. & P. 507.

² *Godefroy v. Jay*, 3 C. & P. 192; *R. v. Bellamy*, Ry. & M. 171; *Lee v. Meacock*, 5 Esp. 177; *B. N. P.* 228; *R. v. Birch*, 3 Q. B. 431, per *Ld. Denman*; *Ayrey v. Davenport*, 2 N. R. 474; *R. v. Robinson*, 1 *Crawf. & D.*, C. C. 329. See *Fisher v. Dudding*, 9 *Dowl.* 872.

³ *B. N. P.* 234; *Pitton v. Walter*, 1 *Str.* 162; *Lee v. Gansel*, 1 *Cowp.* 3, per *Ld. Mansfield*; *Fitch v. Smallbrook*, *T. Ray.* 32; *Fisher v. Kitchingman*, *Willes*, 367; *Gillespie v. Cumming*, *Long. & T.* 181; *Jameson v. Leitch*, *Milw. Ec. Ir. R.* 688, 689; *Holt v. Miers*, 9 C. & P. 196. This rule seems to have been relaxed in two N. P. cases, *Foster v. Compton*, 2 *Stark. R.* 364; and *Garland v. Scoones*, 2 *Esp.* 648. *Sed qu.* See post, § 1573, as to some exceptions to the rule.

⁴ *R. v. Shaw*, *R. & R.* 526.

⁵ See 3 *Bl. Com.* 24; *Co. Lit.* 260 a.

⁶ *Jones v. Randall*, 1 *Cowp.* 17.

⁷ 8 & 9 *V.*, c. 113, § 3, cited ante, § 7.

paper book, in which the proceedings of the court have been entered by the Clerk of the Peace, or by a copy of it, provided the minutes sufficiently disclose the jurisdiction of the court, and it be shown that, in practice, no other record of a more formal character is kept.¹ If, however, this last fact be not proved, or if the jurisdiction of the court do not appear in the minutes, as, for instance, if the caption be omitted, neither the book nor the copy can be received,²

§ 1572. Again, in all proceedings civil or criminal before the Civil Bill Courts in Ireland, the entry in the clerk of the peace's book of a decree or dismiss, is rendered by statute conclusive evidence of such a judgment having been pronounced, and it is unnecessary to produce the decree or dismiss signed by the chairman.³ Again, the proceedings of the ecclesiastical courts may be proved by the minute books in which they are entered, or by copies of such books, if it be shown that in practice they are never reduced into a more formal shape;⁴ and the same rule will prevail with respect to the orders of the Metropolitan Police Magistrates,⁵ and to the judgments and other proceedings of courts-baron,⁶ sheriff's courts,⁷ mayor's courts,⁸ and other courts of inferior jurisdiction.⁹ Indeed, with respect to such courts of inferior jurisdiction as are not courts of record, it seems that their judgments may be proved by the officer of the court, or any other competent person, if it appear that, in fact, no entry of them has been made in any official book.¹⁰ Thus, where a railway Act, after empowering

¹ *R. v. Yeoveley*, 8 A. & E. 806. The orders of Justices forming a highway district, are provable by copies certified by the Clerk of the Peace, 27 & 28 V., c. 101, § 12.

² *R. v. Ward*, 6 C. & P. 366, explained in *R. v. Yeoveley*, 8 A. & E. 818, 819; *Giles v. Siney*, 3 New R., Q. B. 78.

³ 27 & 28 V., c. 99, § 57, Ir.

⁴ *Houliston v. Smyth*, 2 C. & P. 25; *R. v. Hains*, Comb. 337, per Ld. Holt; Skin. 584, S. C.

⁵ *Lond. School Board v. Harvey*, L. R., 4 Q. B. D. 451; 48 L. J., M. C. 131, S. C.

⁶ *Dawson v. Gregory*, 7 Q. B. 756.

⁷ *Arundell v. White*, 14 East, 218—220.

⁸ *Fisher v. Lane*, 2 W. Bl. 834; 3 Wils. 297, S. C.

⁹ *R. v. Hains*, Comb. 337; Skin. 584, S. C.

¹⁰ *Dyson v. Wood*, 3 B. & C. 449, 451.

owners of lands to claim compensation from the company, the amount in case of dispute to be settled by a sheriff's jury, directed that the verdicts and judgments thereon should be deposited with the Clerk of the Peace for the county among the records, and should be deemed records, the Court held that, on proof of non-compliance with this direction, parol evidence of such a verdict, and of the grounds on which it proceeded, might be given, and the undersheriff was called for this purpose.¹

§ 1573. The rule requiring the record or judicial entry to be formally completed, before either the original or a copy can be admitted in evidence, is subject, as it would seem, to *three exceptions*. First, when the object is to show to any particular court, that some trial has been held or other proceeding has occurred before the same court while sitting under the same commission, a minute of the former proceeding will be admitted in lieu of the record, because, in this case, the formal record cannot be presumed to have been made up.² Secondly, the same course will be allowed, where, in consequence of some ulterior proceedings in a cause having been taken, the record cannot, at the time when the evidence is required, have been regularly completed. The case of *R. v. Browne*³ will illustrate this exception. That was an indictment for perjury on a trial at Nisi Prius, and in order to prove the trial, the Nisi Prius record was tendered. No postea was indorsed upon it, but merely a minute of the verdict in the hand-writing of the associate. An objection being taken to this evidence, the court admitted it, on proof by the associate that a motion for a new trial was pending, and that until that rule was disposed of, the postea could not be indorsed. Perhaps, however, it was unnecessary to prove this last circumstance; for, thirdly, where the object of the evidence is merely to establish the fact that a certain judicial proceeding has taken place, as, for instance,

¹ *Manning v. E. Cos. Ry. Co.*, 12 M. & W. 237, 243, 249.

² *R. v. Tooke*, 25 How. St. Tr. 446—449; recognised in *R. v. Smith*, 8 B. & C. 343; *R. v. Robinson*, 1 Craf. & D., C. C. 329; *R. v. Reilly*, Ir. Cir. R. 795, per Doherty, C. J.

³ 3 C. & P. 572; M. & M. 315, S. C. In the last-named report the fact that a new trial had been moved for does not appear.

that a trial has been had, a verdict given, or a writ issued, without regard to the facts disputed at the trial, found by the jury, or mentioned in the writ, and irrespective of all ulterior proceedings in the cause, it has been held that the record need not be formally drawn up.¹ Thus, the postea indorsed on the Nisi Prius record will be sufficient evidence of a trial, to let in the testimony of a witness since deceased,² or, perhaps, to support an indictment against a witness for perjury;³ and where the fact that a writ has issued is mere matter of inducement, that fact may be proved by producing the writ, though it has not been returned, and is, consequently, not a record.⁴ So, when a prisoner was indicted at the Central Criminal Court for perjury committed by him on a trial held at the same court some six months before, the production by the officer of the court of the caption, the indictment with the indorsement of the prisoners plea, the verdict, the sentence, and the minutes of the trial as made by the officer, was held to be sufficient evidence of the trial, without the production of the record, or of any certificate of it, either under § 13 of 14 & 15 V., c. 99, or under § 22 of 14 & 15 V., c. 100.⁵

§ 1574. In proving records, it is sometimes a question of nicety to determine *how much of the proceedings must be given in evidence*: and as the practice in this respect differs widely according to the *object* for which the evidence is tendered, it is difficult to lay down any distinct rule. It may, however, be stated broadly, that where the object is merely to prove the existence of the record in question, that fact may be established by producing the document alone; but

¹ B. N. P. 234; *Pitton v. Walter*, 1 Str., 162; *Fisher v. Kitchingman*, Willes, 367; *Barton v. Dupuy*, 1 Mart. N. S. 442.

² *Pitton v. Walter*, 1 Str. 162.

³ *R. v. Browne*, 3 C. & P. 572; *M. & M.* 315, S. C.; *R. v. Coppard*, *M. & M.* 118. See *R. v. Page*, 2 Esp. 649, n.; and *R. v. Gordon*, C. & Marsh. 410, in which case it was held by Ld. Denman, that an allegation in an indictment for perjury that judgment was "entered up" in an action, was proved by producing from the judgment office the book in which the inscription was entered. But see *R. v. Thring*, 5 C. & P. 507; and *R. v. Robinson*, 1 Cawf. & D., C. 329, where it was held that, on an indictment for perjury in a prosecution, the record of the former trial must be made up.

⁴ B. N. P. 234.

⁵ *R. v. Newman*, 2 Den. 390; 3 C. & Kir. 210, S. C. See post, §§ 1612, 1613. (4210)

if the record be relied upon as proof of certain facts stated therein, or adjudicated thereby, all the proceedings which are necessary, either to render valid, or to explain, the particular document, must, in general, be put in evidence. For instance, if *a decree in Chancery* is offered, merely to prove that it was in fact made, here, as in the case of verdicts,¹ no proof of any other proceeding is required;² but if a party intends to avail himself of a decree, as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must generally prove, not only the decree, but the pleadings upon which it was founded; because, without such proof, it may be impossible to understand the decree, or to ascertain with certainty what disputed questions have been decided by it.³ Where the pleadings are fully recited in the decree, this reasoning does not apply; and, consequently, it has more than once been held that, in that case, the production of the decree alone will be sufficient.⁴ On one occasion it was strenuously contended, that the depositions referred to in a decree must also be read as a part of the record; but the court ruled otherwise, observing, that it is from the pleadings only that the questions in dispute are collected, and that the sole object of referring to the depositions, is to bring the same facts before a court of appeal, if necessary.⁵

§ 1575. Again, *a judgment of the Ecclesiastical Court* cannot be made evidence without producing the libel and answer and the defensive allegations;⁶ and on the same principle, if an appeal from such judgment has been heard, the decree of the court of

§ 1411

¹ Ante, § 1573.

² *Jones v. Randall*, 1 Cowp. 18; B. N. P. 235; *Blower v. Hollis*, 1 C. & M. 393; 3 Tyr. 356, S. C., where it was held, that an order for an attachment for not paying costs of an equity suit, was alone *prima facie* evidence that a suit had been pending.

³ *Blower v. Hollis*, 1 C. & M. 396, per Bayley, B.; *Leake v. M. of Westmeath*, 2 M. & Rob. 397, per Tindal, C. J.; *Attwood v. Taylor*, 1 M. & Gr. 289, 290, per Ld. Abinger.

⁴ *Wheeler v. Lowth*, Com. Dig., tit. Ev. C. 1; *Wharton Peer.*, 12 Cl. & Fin. 301, 302.

⁵ *Laybourn v. Crisp*, 4 M. & W. 326,—328; 8 C. & P. 397, 403—406.

⁶ *Leake v. M. of Westmeath*, 2 M. & Rob. 394, per Tindal, C. J. This case virtually overrules *Stedman v. Gooch*, 1 Esp. 6, 8.

appeal cannot be admitted, without proving that court to have been duly in possession of the suit, by producing the process of appeal, that is, the transcript of the proceedings sent from the court below.¹ The same rules apply to sentences in the Admiralty Division of the High Court, and to judgments in courts-baron and other inferior courts.² Whether an adjudication by the late Insolvent Debtors' Court for the discharge of a prisoner, could be received as evidence of his insolvency, without putting in his petition and schedule, is a question on which the authorities differ;³ though, on strict principle, such evidence would seem to be inadmissible.

§ 1576. *Depositions in Chancery*, taken under the old system, § 1413 cannot in general be read, without proof of the bill and answer, in order to show that a cause was depending, as well as who were the parties, and what was the subject-matter in issue; for, if no cause were depending, the depositions are but voluntary affidavits; and if there were one, the depositions cannot be read, unless the cause was against the same parties or those claiming in privity with them.⁴ Still, the bill and answer, by being so put in, do not become evidence to be submitted to the jury, and the opposite counsel has consequently no right to read or refer to them in his address; for the judge only is to look at them, for the purpose of determining whether the depositions are evidence, by seeing what was in issue in the suit.⁵ Moreover, no proof of the bill or answer is necessary, where the deposition is used against the deponent as his own admission, or for the purpose of contradicting him as a witness.⁶

¹ *Leake v. M. of Westmeath*, 2 M. & Rob. 394, per Tindal, C. J.

² Com. Dig., tit. Ev. C. 1.

³ In *M'Kee v. Farnam*, 1 Cawf. & D., C. C. 209, Torrens, J., rejected the adjudication; but in *Brennan v. Dillane*, Ir. Cir. R. 853, Ball, J., admitted that document without the petition, though he required the production of the schedule. This last decision is said to have been followed by Jackson, J., in a later case, *id.*

⁴ *Laybourn v. Crisp*, 4 M. & W. 326, per Ld. Abinger; *Blower v. Hollis*, 1 C. & M. 399, Maule, argu.; 2 Ph. Ev. 149; B. N. P. 240; *Nightingal v. Devisme*, 5 Burr. 2594.

⁵ *Chappell v. Purday*, 14 M. & W. 303.

⁶ *Highfield v. Peake*, M. & M. 109.

§ 1577. Where a party relies upon depositions taken prior to 1852 in England,¹ or 1867 in Ireland,² he must read the interrogatories as well as the answers, unless he can prove that the former are lost or destroyed,³ and it seems that he must also read as part of his case the whole deposition, including the cross-interrogatories and answers thereto.⁴ Depositions taken since those dates, whether under the present⁵ or the proceeding system, are not open to these niceties;⁶ for the oral examinations of the witness is "taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness."⁷ The party, however, who seeks to put these depositions in evidence, must remember that they ought,—except under special circumstances,⁸—to be written by or in the presence of the examiner, and further, that they must be authenticated by his signature, and must also be transmitted by him to the Central Office, to be there filed.⁹ Proof, therefore, must be forthcoming that these regulations have been complied with, if the admissibility of the dispositions be disputed; but the original documents need not be produced, for it will suffice to put in evidence either examined copies of them,¹⁰ or copies certified as true copies by the officer to whose custody the originals are intrusted.¹¹

§ 1578. *Depositions taken under special commissions cannot, in* § 1415

¹ When 15 & 16 V., c. 86, passed. ² When 30 & 31 V., c. 44, Ir., passed.

³ *Rowe v. Brenton*, 8 B. & C. 765.

⁴ *Temperley v. Scott*, 5 C. & P. 341, per Tindal, C. J.

⁵ Rules of Sup. Ct., 1883, Ord. XXXVII., R. 5, cited ante, § 506.

⁶ *Fleet v. Perrins*, 3 Law Rep., Q. B. 536; 37 L. J., Q. B. 233; & 9 B. & S. 575, S. C.

⁷ Ord. XXXVII., R. 12, of Rules of Sup. Ct. 1883. The Irish Act adds the words, "and in the first person." See 30 & 31 V., c. 44, § 99, Ir.

⁸ *Bolton v. Bolton*, L. R., 2 Ch. D. 217, per Hall, V.-C.; *Stobart v. Todd*, 23 L. J., Ch. 956, per Kindersley, V.-C.; *Cooper v. Macdonald*, 36 L. J., Ch. 304, per Ld. Romilly, M. R.

⁹ Ord. XXXVII., R. 16; 30 & 31 V., c. 44, § 102, Ir. In Ireland the deposition must be sent to the "office of the Clerk of Affidavits." Id.

¹⁰ *Fleet v. Perrins*, 3 Law Rep., Q. B. 536; 37 L. J., Q. B. 233; & 9 B. & S. 575, S. C.

¹¹ 30 & 31 V., c. 44, § 102, Ir.; 14 & 15 V., c. 99, § 14, cited post, § 1599; *Reeve v. Hodson*, 10 Hare, App. xix., per Wood, V.-C.

general, be read without proof of the commission and return. Nay, it has more than once been contended that it is necessary in these cases to go further, and to put in the order, the pleadings, or the other judicial proceedings, upon which the commission has been founded. Lord Ellenborough, however, on one occasion expressed a contrary opinion at *Nisi Prius*; ¹ and Chief Baron Pollock more recently is said to have held, that the commission must be taken *prima facie* to have issued regularly, and, consequently, that the production of the order was not requisite.² This ruling, which is certainly convenient, has moreover been partially sanctioned, though not distinctly recognised, by the old Court of Queen's Bench.³

§ 1579. Doubts have also been entertained respecting the legal § 1416 mode of transmitting the depositions, &c., to the courts, and it has not yet been fully determined whether the commissioners may avail themselves of the Post-office, or whether the documents must be sent by a special messenger.⁴ In one case the commission was sent by post, addressed to certain commissioners in Newfoundland. After a few months a sealed packet was brought to the Masters' office by a person unknown, and was found to contain the commission, the return to it, and the examinations of the witnesses, signed by the persons named as commissioners. The handwriting of the commissioners being proved, as also the fact that they were living at Newfoundland, the court held that sufficient evidence had been given to establish the validity of the return.⁵

§ 1580. Subject to the observations contained in the two fore- § 1417 going sections, *examinations* or *depositions* taken by virtue of the English Act, 1 W. 4, c. 22, or the Irish Act, 3 & 4 V., c. 105, or more recently, under the Rules of the Supreme Court, 1883,⁶ may

¹ *Bayley v. Wylie*, 6 Esp. 85. As to examinations under writs of mandamus, see ante, §§ 500—505, 1563.

² *Entwistle v. Dent*, cited *arguendo* in 11 Q. B. 1002.

³ *Greville v. Stulz*, 11 Q. B. 997, 1004—1006.

⁴ See *Cox v. Newman*, 2 Ves. & B. 168, 170.

⁵ *Simms v. Henderson*, 11 Q. B. 1015.

⁶ Ord. XXXVII., R. 5, et seq.

be read in evidence, saving all just exceptions, if they purport to be certified under the hand of the commissioner, examiner, or other person taking the same,¹ and if it further appears to the satisfaction of the judge, either that the examinant or deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, or,—where the depositions have been taken under the new Rules,—that the judge ordering the examinations has given some special directions with respect to their admissibility.²

§ 1581. The mode of proving the *examination* of prisoners, and the *informations* or *depositions* of witnesses, which have respectively been taken by justices or coroners, in *criminal* cases, has already been explained in previous parts of this work.³

§ 1582.⁴ The return to *inquisitions* post mortem, and other inquisitions, surveys, extents, and the like, cannot *strictly*⁵ be proved, without reading the commissions on which they depend;⁶ unless in cases of general concernment, when the commission will be regarded as a thing of such public notoriety as not to require proof.⁷

§ 1583. To prove an *award*, it is not only necessary to produce and prove the due execution of that instrument, but the submission to reference must also be proved; for otherwise the authority of the arbitrator to decide the question between the parties does not appear.⁸ If the submission be by a written agreement, its execution by all the parties, including the party relying upon it, must be

¹ 8 & 9 V., c. 113, § 1, cited ante, § 7.

² Ord- XXXVII., RR. 5, 18, cited ante, § 506.

³ As to examinations, ante, §§ 888—901; as to depositions, ante, §§ 479—494.

⁴ Gr. Ev. § 515, in part.

⁵ As to when this rule will be relaxed, see post, § 1585.

⁶ *Evans v. Taylor*, 7 A. & E. 617; 3 N. & P. 174, S. C.; B. N. P. 228; *Newburgh v. Newburgh*, 3 Br. P. C. 553; Hub. Ev. of Suc. 589, 590.

⁷ *Sir Hugh Smithson's case*, per Ld. Hardwicke, cited B. N. P. 228, 229.

⁸ *Ferrer v. Oven*, 7 B. & C. 427; 1 M. & R. 222, S. C.; *Antram v. Chace*, 15 East, 209; *Brazier v. Jones*, 8 B. & C. 124.

strictly proved;¹ and that, too, though it has been made a rule of court, pursuant to one of its terms;² but if the arbitrator has been appointed by any rule of court, judge's order, or order of Nisi Prius, in any action,³ then, on proving the award, and producing the rule or order of reference, a sufficient *prima facie* case will be made out; and it will not be necessary to show, by producing the record in the original action, or otherwise, what specific matters were actually referred.⁴ If the submission contain a power to appoint an umpire, or to enlarge the time for making the award, and such power be acted upon, proof must be given of the instrument by which the umpire was appointed, or the time enlarged; and a mere recital in the award will not be evidence of these facts;⁵ neither can the appointment be proved by showing that the umpire had undertaken the duties belonging to his office, and had actually signed the award.⁶ As the executing an award is a judicial act, proof should be given in all cases where more than one arbitrator is appointed, that the signing by the joint arbitrators took place in the presence of each other;⁷ or if, under the terms of reference, the award is to be good although it be executed by a less number than all the arbitrators, still it must be shown that the arbitrator, who has not signed the instrument, has had notice to attend the execution, and has omitted or refused to do so.⁸

§ 1584. In the case of *awards by public officers*, a less rigid amount of proof will sometimes be deemed sufficient, and in the absence of evidence of any subsequent usage inconsistent with the award, the maxim, *omnia præsumentur ritè esse acta*, will be held to apply.⁹ Thus, where commissioners, named in an Inclo-

¹ Cases cited in last note.

² *Berney v. Read*, 7 Q. B. 79.

³ 3 & 4 W. 4, c. 42, § 39; 3 & 4 V., c. 105, § 63, Ir.

⁴ *Gisborne v. Hart*, 5 M. & W. 50; recognised in *Dresser v. Stansfield*, 14 M. & W. 828, per Parke, B.

⁵ *Still v. Halford*, 4 Camp. 19, per Ld. Ellenborough; *Davis v. Vass*, 15 East, 97.

⁶ *Still v. Halford*, 4 Camp. 19.

⁷ *Stalworth v. Inns*, 13 M. & W. 466; *Wright v. Graham*, 3 Ex. R. 131; *Eads v. Williams*, 4 De Gex, M. & G. 674; *Lord v. Lord*, 5 E. & B. 404.

⁸ *White v. Sharp*, 12 M. & W. 712; *Wright v. Graham*, 3 Ex. R. 134, per Parke, B.; *In re Beck & Jackson*, 1 Com. B., N. S. 695.

⁹ *R. v. Haslingfield*, 2 M. & Sel. 558; *Doe v. Gore*, 2 M. & W. 321; *Doe v.*

sure Act, and authorised thereby to stop up roads, provided two justices made an order to that effect, published their award, which recited such order, and by which they stopped up a certain public footpath, it was held, that this recital was sufficient *prima facie* evidence of a valid order, on proof of an ineffectual search for the instrument itself, and that the award must be taken to have been rightly made, unless some proof of enjoyment inconsistent with it could be given.¹ The principle of this case has been carried much further by the Legislature; for awards made and confirmed by commissioners under many General Inclosure Acts of the present reign,² are rendered *conclusive* evidence of a compliance with those Acts, and of all necessary notices and consents; and everything specified in such awards is binding and conclusive on all persons.³

§ 1585. In proving *ancient* records, the strict rules of evidence § 1423 are sometimes relaxed. Thus, a document, purporting by its contents to be an exemplification of a commission issued by Queen Elizabeth, and produced from the proper place of deposit, has been allowed to be read, without any evidence of its being a true copy, though no seal was affixed to it, and the state of the parchment was such as to render it impossible to say whether the Great Seal had ever been appended.⁴ So, ancient depositions may be read without putting in the interrogatories,⁵ or the bills and answers to which they relate,⁶ or the commissions under which they were taken,⁷ if it be proved that search has been made for these documents, and that they cannot be found; and on the like proof, answers may, it seems, be received in evidence, though the bills

Mostyn, 12 Com. B. 268; Heysham v. Forster, 5 M. & R. 277. As to when such awards may be proved by certified copies, see post, § 1607.

¹ Manning v. East. Cos. Ry. Co., 12 M. & W. 237; Williams v. Eyton, 27 L. J., Ex. 176; 2 H. & N. 771, S. C.; 4 H. & N. 357, S. C. in Ex. Ch.

² 6 & 7 W. 4, c. 115; 3 & 4 V., c. 31; 8 & 9 V., c. 118; 9 & 10 V., c. 70; 10 & 11 V., c. 111; 11 & 12 V., c. 99.

³ See 3 & 4 V., c. 31, § 1; and 8 & 9 V., c. 118, §§ 104, 105, 157. See 17 & 18 V., c. 104, § 173, as to submissions to, and awards by, Shipping Masters.

⁴ May. of Beverly v. Craven, 2 M. & Rob. 140, per Alderson, B.

⁵ Rowe v. Brenton, 8 B. & C. 765.

⁶ Byam v. Booth, 2 Price, 234, n.

⁷ Bayley v. Wylie, 6 Esp. 85, per Ld. Ellenborough.

be not forthcoming. So, ancient extent, surveys, or returns to inquisitions, which came from the proper custody, and which bore internal evidence of having been taken under due authority, have sometimes been admitted, especially when they were tendered as evidence of reputation, though the commissions on which their legality depended could not be found.¹ Where, however, such documents contain no internal evidence of authenticity, they cannot be read, unless the commissions be produced from the proper depository;² neither can they then, if their appears to have been any excess of authority, or any other irregularity in the proceedings, sufficiently serious to render them not only voidable but void.³ Whether a record be ancient or modern, it is of course allowable, after proof of its loss or destruction, to show its contents, as in the case of any other document, by secondary evidence.⁴

§ 1586. Before leaving the subject of judicial proceedings, it is necessary to advert to certain documents, which, though emanating from courts of justice, are not strictly records, or such proceedings, as, for the most part, are capable of being primarily proved by means of copies. First, *writs of execution and warrants of commitment*, until they are returned, must be proved by actual production, though, after their return, they become matters of record, and are, consequently, provable by copies.⁵ With respect to writs of summons under the Rules of the Supreme Court, these may be proved by the production, either of the originals, or of the copies filed by the officer of the court under Ord. V. RR. 12 & 13, or, if the originals be lost, by copies authenticated by the court or a

¹ *Rowe v. Brenton*, 8 B. & C. 747—750; 3 M. & R. 133, S. C.; *Doe v. Roberts*, 13 M. & W. 520, 531, 533; *Vicar of Kellington v. Trinity College*, 1 Wils. 170; *Alcock v. Cook*, cited 2 Ph. Ev. 149, n. 1; *Anderston v. Magawley*, 3 Br. P. C. 588; *Gabbett v. Clancy*, 8 Ir. Law R. 299.

² *Evans v. Taylor*, 7 A. & E. 617; 3 N. & P. 174, S. C. See *D. of Beaufort v. Smith*, 4 Ex. R. 450; *Freeman v. Read*, 4 B. & S. 174.

³ *Vaux Barony*, Min. Ev. 67; *Powis Barony*, cited *Cruise*, Dign., c. 6, § 60; *Leighton v. Leighton*, 1 Str. 308; *Hubb. Ev. of Succ.* 590.

⁴ *Ante*, 428, et seq.

⁵ B. N. P. 234. If the writ is the gist of the action it must be returned, *id.* As to inhibitions, citations, monitions, &c., arising out of appeals to the Privy Coun. from decisions of the Admi. or Ecl. Cts., see 6 & 7 V., c. 38, § 9.

judge,¹ and anyone of these documents will furnish proper evidence of the institution of the action, to which they relate.² When writs of summons or writs of execution have been renewed under the Rules of the Supreme Court,³ the fact of renewal may be proved by the production of the respective writs, provided they purport to be marked with the seal of the court, showing them to have been duly renewed.⁴ The renewal of a writ of execution may also be proved by a written notice to the sheriff signed by the party or his solicitor, and bearing the seal of the court, with the day, month and year of renewal, impressed thereon.⁵ Next, a *certificate of a judge*, if not indorsed on a record, cannot, it seems, be proved by a copy, but the original must be produced, when the courts will judicially notice the signature, if it purport to be that one of the judges of the Supreme Court, or of one of the old equity or common-law judges of the Superior Courts at Westminster.⁶ But a judge's *order* in any cause or matter may now be proved and enforced as a judgment to the same effect.⁷ The *pleadings* in an action may be proved either by producing the originals, or by means of the copies filed with the officer of the court, under Ord. XLI., R. 1.⁸

¹ Ord. VIII., R. 3, is as follows:—"Where a writ, of which the production is necessary, has been lost, the court or a judge, upon being satisfied of the loss, and of the correctness of a copy thereof, may order that such copy shall be sealed and served in lieu of the original writ."

² *R. v. Scott*, L. Q., 2 Q. B. D. 415; 46 L. J., M. C. 259; 13 Cox, 594, S. C.

³ Ord. VIII., R. 1; Ord. LXII., R. 20.

⁴ Ord. VIII., R. 2, is in these words:—"The production of a writ of summons, purporting to be marked with the seal of the court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes." Ord. XLII., R. 21, is as follows:—"The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed." The Irish Act 16 & 17 V., c. 113, contains in §§ 30 & 142, similar provisions.

⁵ Ord. LXII., RR. 20, 21.

⁶ 8 & 9 V., c. 113, § 2, cited ante, § 7.

⁷ Ord. XLII., R. 24.

⁸ *R. v. Scott*, L. R., 2 Q. B. D. 415; 46 L. J., M. C. 259, S. C. See, also, Ord. XXXVI., R. 30.

§ 1586a. Questions of nicety often used to crop up in the High Court respecting the service of proceedings therein, and the mode of proving such service. The Rules of 1883 attempt to grapple with this evil, but it remains to be discovered by actual practice whether or not they have much simplified matters. The most important Rules on this subject are as follows:—First, Order LXIV., R. 11. “Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected *before the hour of six in the afternoon, except on Saturdays*, when it shall be effected before the hour of *two* in the afternoon. Service effected after six in the afternoon on any week-day except Saturday, shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall, for the like purpose, be deemed to have been effected on the following Monday.”

R. 12. “In any case in which any particular number of days, not expressed to be clear days, is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day.”

Next, Order LXVII., R. 1. “Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited.”

R. 2. “All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications, in respect of which personal service is not requisite, shall be sufficiently served if *left* within the prescribed hours,¹ at the *address for service* or the person to be served as defined by Orders IV. and XII., with any person resident at or belonging to such place.”

R. 3. “*Notices* sent from any office of the Supreme Court *may be sent by post*; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service.”

R. 4. “Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, *has omitted to*

¹ See R. 11, cited above.
(4220)

give an address for service as required by Orders IV. and XII., all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications, in respect of which personal service is not requisite, may be served by filing them with the proper officer."

R. 5. "When *personal* service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons."

R. 6. "Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, and it is made to appear to the Court or a Judge that prompt personal service cannot be effected, the Court or Judge may make such order for *substituted or other service*,¹ or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just."

R. 7. "Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications, which ought to be delivered to or served upon the party on whose behalf the notice is given, shall thereafter be delivered to or served upon such solicitor."

R. 8. "Where a person who is not a party appears in any proceeding either before the Court or in Chambers, service upon the solicitor in London by whom such person appears, whether such solicitor act as principal or agent, shall be deemed good service except in matters requiring personal service."

R. 9. "Affidavits of service shall state when, where, and how, and by whom, such service was effected."

Lastly, Order X., R. 1. "Every application to the Court or a Judge for an order for substituted or other service, or for the sub-

¹ See Ord. X., cited below.
(4221)

stitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.”

§ 1586b. The service of process in the County Courts used originally to be proved either by the oath of the officer, or, if the service was effected in a foreign district, by affidavit;¹ but as these modes of proof were found to be inconvenient, a more simple plan was adopted in 1875, the County Court Act of that year enacting, in substance, that, where any summons or process of the Court is served by a bailiff, the service may be proved by indorsement on a copy of such document under the bailiff's hand, showing the fact and mode of such service; and any bailiff wilfully and corruptly indorsing any false statement on such copy shall incur the same penalties as if he had committed perjury.²

§ 1586c. The proof of the service of *process* in *Courts of summary jurisdiction* is now simplified to a certain extent by § 41 of the Summary Jurisdiction Act, 1879;³ and as that enactment has a very wide operation, it may be thought desirable to set it out at length. It is in these words:—“In a proceeding within the jurisdiction of a court of summary jurisdiction, without prejudice to any other mode of proof, service on a person of any summons, notice, process, or document required or authorised to be served, and the handwriting and seal of any justice of the peace or other officer or person on any warrant, summons, notice, process, or document, may be proved by a solemn *declaration* taken before a justice of the peace, or before a commissioner to administer oaths in the Supreme Court of Judicature, or before a clerk of the peace, or a registrar of a county court; and any declaration purporting to be so taken shall, until the contrary is shown, be sufficient proof of the statements contained therein, and shall be received in evidence in any court or legal proceeding, without proof of the signature or of the

¹ 9 & 10 V., c. 95, § 62; repd. by 38 & 39 V., c. 50, § 12, Sch. C.

² 38 & 39 V., c. 50, § 3.

³ 42 & 43 V., c. 49. See, also, 44 & 45 V., c. 24, § 4, subs. 1, extending the operation of the sect. cited above to the proof of English process executed in Scotland, and Scotch process executed in England.

official character of the person or persons taking or signing the same." The fee for taking any such declaration cannot exceed one shilling, the declaration may be in a form provided by rule, and any person wilfully making a false declaration in any material particular "shall be guilty" of perjury.¹

§ 1587. With respect to the Rules and Orders of the Supreme Court, the Rules of the old superior Common-law Courts, and the Orders of the old Court of Chancery, these may severally be proved in any court by the production of office copies, for such copies are given out by the officer in the usual course of his business.² Probably, however, it will never in practice be necessary to have recourse to this mode of proof, but advocates and suitors will be content to rely on the authenticity of any copy, which purports to be printed by an authorised printer, or to be published as a portion of the authorised reports. Some doubt exists as to the mode of proving the *general rules* and regulations of *inferior courts*. In one case, where it appeared that the Insolvent Debtors' Court, now abolished, had ordered the printing and circulation of its rules for the guidance of its officers, Lord Tenterden admitted one of these printed copies as primary evidence, though the original rules under the seal of the court were kept at the court, and no proof was given that the copy produced had been compared with them.³ In another case, however, where an officer of the same court produced what purported to be a printed copy of the rules of the court, and stated that he had obtained it from the clerk of the rules, and that he was in the habit of distributing similar copies as authentic documents, the court rejected the copy, as the witness could not otherwise vouch for its authenticity, and no evidence was offered that these printed rules had ever been sanctioned by the court.⁴ § 1425

§ 1588. The *probate* of a will is a copy of that instrument § 1426

¹ See previous note.

² *Selby v. Harris*, 1 Ld. Ray. 745; *Duncan v. Scott*, 1 Camp. 102; *Streeter v. Bartlett*, 5 Com. B. 562, 564; *Jack v. Kiernan*, 2 Jebb & Sy. 233; *May v. Ludlow v. Charlton*, 9 C. & P. 242, 246, 247.

³ *Dance v. Robson*, M. & M. 294.

⁴ *R. v. Koops*, 6 A. & E. 198. In this case, *Dance v. Robson* was not cited. (4223)

under the seal, either of the Ecclesiastical Court, or, since the 11th of January, 1858, of the Court of Probate, which copy is attached to a certificate, stating that the original will has been duly proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein.¹ This document,—which, in the event of the will being proved in solemn form of law, can only be granted after satisfactory evidence has been furnished to the court of adequate capacity on the part of the testator, of testamentary intention untainted by fraud, and of due execution,²—constitutes the title-deed of the executor, without which his character cannot be recognised, and with which it cannot in general be impugned, in any court.³

§ 1589. The primary mode of proving a probate is by producing § 1427 either the document itself, when due notice will be taken of the seal,⁴ or the Act book or register from the Probate Division,⁵ containing an entry that the will has been proved, and probate granted, or even a certified or examined copy of such book or register.⁶ If, indeed,—as was formerly the practice in some of the inferior spiritual courts,⁷—no Act-book, or other separate record of the granting of probates, has been kept, but on the will itself a memorandum has been indorsed, stating that the executor has proved it, and that the probate has passed the seal; then, on proof of such

¹ Toller on Ex. 58.

² *Jones v. Goodrich*, 5 Moo. P. C. R. 19, 21, per Dr. Lushington

³ Toller on Ex. 74, 75; *Allen v. Dundas*, 3 T. R. 125; *Keynes v. D. of Wellington*, 9 Beav. 579, 599, 601. As to the jurisdiction of the Probate Division to grant probate in the case of a married woman's will made in pursuance of a power, see *Barnes v. Vincent*, 5 Moo. P. C. R. 201, cited post, § 1712. See, also, *Ward v. Ward*, 11 Beav. 377. As to the effect of the Probate Division sealing Scotch confirmations of executors, see 21 & 22 V., c. 56, §§ 12, 13. See, also, *Hawarden v. Dunlop*, 2 Swab. & Trist. 340; and *Hood v. Ld. Barrington*, 6 Law Rep., Eq. 218.

⁴ *Kempton v. Cross*, Rep. temp. Hardw. 108; ante, § 6.

⁵ *Cox v. Allingham*, Jac. 514. So, the revocation of probate may be proved by the Act-book; *R. v. Ramsbottom*, 1 Lea. 25, n. See ante, § 425.

⁶ *Davis v. Williams*, 13 East. 232; *R. v. Phillpott*, 2 Den. 308, per Talfourd, J.; *Dorrett v. Meux*, 15 Com. B. 142; 14 & 15 V., c. 99, § 14, cited post, § 1599.

⁷ For instance, the Bishop's Courts at Winchester and Wells, 7 A. & E. 240, 243.

former practice, and on production of the will with such indorsement, the title of the executor will be sufficiently established, without accounting for the non-production of the probate.¹ But under no other circumstances will the original will be admitted as evidence of title to *personal* property.² In the event of the probate being lost or destroyed, it seems that it *may* be proved by an examined copy;³ but in such case the practice of the Probate Division,⁴—like that which used to prevail in the spiritual courts,—is to grant either an exemplification, or a certified copy of the entry of the Act-book or register, in which the grant of probate is recorded.⁵

§ 1590. The granting *administration*, which,—like the granting § 1428 of probate,—is the act of the Probate Division, may be proved by producing either the letters of administration under the seal of the court,⁶ or the Act-book or register containing a record of the grant, or an exemplification, or an examined or a certified copy of such record,⁷ or an official certificate of the grant;⁸ and either of these kinds of proof will be admissible as primary evidence.⁹

§ 1591.¹⁰ The next class of public writings to be considered con- § 1429

¹ Doe v. Mew, and Doe v. Gunning, 7 A. & E. 240; 2 N. & P. 260, S. C. See, also, Gorton v. Dyson, 1 B. & B. 219; 3 Moore, 558, S. C.

² Pinney v. Pinney, 8 B. & C. 335; R. v. Barnes, 1 Stark. R. 243, per Le Blanc, J.; Stone v. Forsyth, 2 Doug. 707.

³ R. v. Hains, Skinn. 584, per Ld. Holt; Hoe v. Nelthorpe, 3 Salk. 151; 1 Ld. Ray. 154, S. C., nom. Hoe v. Nathrop.

⁴ 20 & 21 V., c. 77, § 69, enacts, that “an official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act.” The fees fixed by the Rules are sixpence for every folio of seventy-two words of office-copy, and an additional fee of £1 for “every office-copy of will *under seal* of the court.” See, also, 20 & 21 V., c. 79, § 74, Ir.

⁵ Shepherd v. Shorthose; 1 Str. 412. See post, § 1599.

⁶ The seal is judicially noticed, ante, § 6.

⁷ See M’Kenna v. Eager, I. R., 9 C. L. 79.

⁸ See 20 & 21 V., c. 77, § 69, cited above, n. 4. See, also, 20 & 21 V., c. 79, § 74, Ir.

⁹ Kempton v. Cross, Rep. temp. Hardw. 108, 109; Elden v. Keddell, 8 East, 187; Davis v. Williams, 13 East, 232. See ante, § 425, and post, § 1599.

¹⁰ Gr. Ev. § 483, in great part.

sists of *official registers*, or books kept by persons in public offices, in which they are required, whether by statute or by the nature of their office, to write down particular transactions, occurring in the course of their public duties, and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual test of truth, namely, the swearing, and the cross-examining, of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly, because they are required by law to be kept, partly, because their contents are of public interest and notoriety, but principally, because they are made under the sanction of an oath of office, or, at least, under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses.¹

§ 1592. To render any document admissible in evidence as an *official register*, it must be one which the *law requires to be kept for the public benefit*. Thus, a book produced from the office, now abolished,² of the Secretary of Bankrupts, in which entries were made of the allowance of certificates, has been rejected, as it was not kept under the authority of any official order, nor were the entries made by any person in the course of his official duty.³ On the same ground, the book called "Arms and Descents of the Nobility, E., 16," though produced from the Herald's College, cannot be received in evidence.⁴ In like manner, a register of attendance kept by the medical officer of a union for the inspection of the guardians, in obedience to a rule of the Poor-Law Commissioners, has been held inadmissible; no credit being given to the officer in respect of the entries, but the book being merely intended as a check upon himself.⁵ So, Lord Denman has refused to admit the register of shipping kept at Lloyd's.⁶ So, a report stating the

¹ 1 St. Ev. 230.

² 15 & 16 V., c. 77, § 1.

³ *Henry v. Leigh*, 3 Camp. 499.

⁴ *Shrewsbury Peer.*, 7 H. of L. Cas. 24.

⁵ *Merrick v. Wakley*, 8 A. & E. 170.

⁶ *Freeman v. Baker*, 5 C. & P. 482. For a description of this book, see *Kerr v. Shedden*, 4 C. & P. 531, n. a. In *Bain v. Case*, 3 C. & P. 496, and in (4226)

burthen of a foreign ship, and the number of the crew, which was made by the master to the authorities at the Custom House, and was there filed, has been rejected, when tendered in evidence as a public document to prove the burthen of the ship; and the same fate has befallen a certificate filed at the Custom-House, which was signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage. In neither of these cases did it appear that the documents had been prepared by any official personage in the discharge of a public duty.¹ So, the registers and records of baptisms and marriages formerly performed at the Fleet and King's Bench Prisons, at May Fair, at the Mint in Southwark and in certain other places, are inadmissible, on the ground that they were not compiled under public authority.² So, a marriage register kept by a clergyman in Ireland, prior to the 31st of March, 1845, when the Irish Marriage Act came into operation, has, for a similar reason, been rejected.³ So, a Jewish register of circumcision, kept at the great synagogue in London, has been rejected, though it was proved that the entries in it were in the handwriting of a deceased Chief Rabbi, whose duty it was to perform the rites of circumcision, and to make corresponding entries in the book.⁴ So, the birth, marriage, or burial register of a Wesleyan or other dissenting chapel will be rejected, unless it has been deposited in the office of the Registrar-General, and entered in his list pursuant to the provisions of the Act of 3 & 4 V., c. 92.⁵

Abel v. Potts, 3 Esp. 242, this book was admitted; in the first-named case, to prove that the coast of Peru was in a state of blockade at a particular time, and in the other, as evidence of the capture of a vessel. See, also, *Richardson v. Mellish*, 2 Bing. 241, per Best, C. J.

¹ *Huntley v. Donovan*, 15 Q. B. 96.

² *Read v. Passer*, 1 Esp. 213; *Pea. R.* 303, S. C.; *Doe v. Gatacre*, 8 C. & P. 578. These registers are now deposited in the office of the Registrar-General, pursuant to the Act of 3 & 4 V., c. 92, §§ 6, 20, which Act, however, does not render them receivable in evidence.

³ *Stockbridge v. Quicke*, 3 C. & Kir. 305, per Parke, B.

⁴ *Davis v. Lloyd*, 1 C. & Kir. 275, per Ld. Denman and Patteson, J. But see observations on this case, ante, § 701.

⁵ *Whittuck v. Waters*, 4 C. & P. 375; *Newham v. Raithby*, 1 Phillim. 315; *Ex p. Taylor*, 1 Jac. & W. 483. As to the Act, see ante, § 1503, and post, § 1602, n. 4.

§ 1593. The same rule prevails with respect to *foreign* and *colonial registers*; that is, copies of such registers will be admissible only on proof that they are required to be kept, either by the law of the country to which they belong,¹ or by the law of this country. In the absence of such proof, a copy of a baptismal register in Guernsey,²—a copy of a certificate of baptism by the chaplain of a British minister at a foreign court,³—a copy of the marriage register kept in the Swedish ambassador's chapel at Paris,⁴ prior to the 28th of July, 1849,⁵—and a copy of the book kept at the British ambassador's hotel in Paris, wherein the ambassador's chaplain had made and subscribed entries of all marriages of British subjects celebrated by him,⁶—have been rejected. But, on the other hand, an examined copy of a marriage register in Barbadoes has been admitted, it appearing that by the law of that colony such register was kept.⁷ So, by virtue of a special Act,⁸ a copy of the marriage registry, which used to be kept in the Ionian Islands, is receivable in evidence, if it *purports* “to be certified under the signature and official seal of the Secretary of the Lord High Commissioner.” In America, authenticated copies of foreign registers are receivable in evidence.⁹

¹ See *Perth Peer.*, 2 H. of L. Cas. 865, 873, 874, 876, 877 : *Abbott v. Abbott & Godoy*, 29 L. J., Pr. & Mat. 57; 4 Swab. & Trist. 254, S. C.

² *Huet v. Le Mesurier*, 1 Cox, Ch. R. 275. On this case, “Dr. Lushington observes that the evidence was rejected, “because it did not appear by what authority the register was kept. Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it is, and that by ancient custom a register was required to be kept there, different considerations might have applied to the case. * * * I am of opinion, that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country.” *Coode v. Coode*, 1 Curt. 766.

³ *Dufferin Peer.*, 2 H. of L. Cas. 47.

⁴ *Leader v. Barry*, 1 Esp. 353.

⁵ When the Act of 12 & 13 V., c. 68, for facilitating the marriage of British subjects in foreign countries, passed.

⁶ *Athlone Peer.*, 8 Cl. & Fin. 262.

⁷ *Coode v. Coode*, 1 Curt. 755, 766, 767, per Dr. Lushington.

⁸ 27 & 28 V.; c. 77, § 7.

⁹ *Kingston v. Lesley*, 10 Serg. & R. 383, 389.

§ 1594.¹ It is also deemed essential to the official character of these books, that the entries in them be made promptly, or, at least, without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed.² Thus, a minister's entry of a baptism, which took place before he had any connexion with the parish, and of which he received information from the clerk, is inadmissible; as is also the private memorandum made by the clerk who was present at the ceremony.³ The court, however, will not reject an entry in a parish register, merely because it was not made contemporaneously, or because it was made or sanctioned by the incumbent, on information received from some other person; for it will be presumed that the incumbent, however he got his information, had satisfied himself of the fact before he authorised the entry. Thus, an entry in a parish book, which was kept at the parish church, of a burial in the workhouse cemetery within the parish, has been received in evidence, though it appeared that the incumbent sanctioned the entries on the faith of statements made by others, and not from his personal knowledge of the burials.⁴ § 1432

§ 1595. It may here be advisable to *enumerate* some of the books which the *law will recognise as official registers*, or public documents. Of this description are parish registers:⁵ the registers of births, marriages, and deaths, made pursuant to the Registration Act;⁶ the registers of births and deaths,⁷ and the register of marriages, in Ireland;⁸ the registers of marriages abroad, as kept by British Consuls since the 28th of July, 1849;⁹ the register of marriages in the Ionian Islands, which has been transmitted to the Registrar-General by the Lord High Commissioner;¹⁰ the registers and certificates of Indian marriages, as delivered to the Registrar- § 1433

¹ Gr. Ev. § 485, as to first five lines.

² Doe v. Bray, 8 B. & C. 813; Walker v. Wingfield, 18 Ves. 443.

³ Id.

⁴ Doe v. Andrews, 15 Q. B. 756.

⁵ Doe v. Barnes, 1 M. & Rob. 386.

⁶ 6 & 7 W. 4, c. 86.

⁷ 26 & 27 V., c. 11, § 5, Ir.

⁸ 7 & 8 V., c. 81, §§ 52, 71, Ir.; 26 & 27 V., c. 27, § 16, Ir.

⁹ 12 & 13 V., c. 68.

¹⁰ 27 & 28 V., c. 77, §§ 8, 9, 10.

General since the 1st of January, 1852;¹ certain non-parochial registers deposited in the office of the Registrar-General, by virtue of the Act of 3 & 4 V., c. 92;² certain registers, muster-rolls, and pay-lists, and certified extracts therefrom, transmitted to the same office under "The Registration of births, deaths, and marriages (Army) Act, 1879";³ the books of baptisms, marriages, and burials in India, deposited at the office of the Secretary for India;⁴ the lists of passengers which, in pursuance of an old statute, used to be transmitted by the captains of ships in the India trade to the Court of Directors;⁵ the deposit and transfer books of the East India Company;⁶ and of the Bank of England;⁷ the rolls of Courts Baron;⁸ land-tax assessments;⁹ Poor-law valuations, and valuations of rateable property, in Ireland;¹⁰ vestry-book;¹¹ bishops' registers and chapter-house registers;¹² terriers;¹³ the books kept at public prisons;¹⁴ the log-books and muster-books of her Majesty's ships, and even official letters lodged at the Admiralty;¹⁵ lists of convoy;¹⁶ the books of the Sick and Hurt Office;¹⁷ the official log-books kept by the masters of merchant ships;¹⁸ the books kept by

¹ 14 & 15 V., c. 40, § 22.

² See ante, p. 1291, n. 5, as to what these registers consist of; and post, p. 1368, n. 4, as to the conditions on which they are receivable in evidence.

³ 42 V., c. 8.

⁴ *Ratcliff v. Ratcliff & Anderson*, 1 Swab. & Trist. 467; *Queen's Proctor v. Fry*, L. R., 4 P. D. 230; 48 L. J., P. D. & A. 68, S. C.; Rep. of 1838, by Comm. to inquire into the state of non-parochial registers, p. 13.

⁵ *Richardson v. Mellish*, 2 Bing. 204.

⁶ 2 Doug. 593, n. 3.

⁷ *Mortimer v. McCallan*, 6 M. & W. 58.

⁸ B. N. P. 247; *Doe v. Askew*, 10 East, 520.

⁹ *Doe v. Seaton*, 2 A. & E. 178, per Patteson, J.; *Doe v. Arkwright*, id. 182, n., per Ld. Denman; *R. v. King*, 2 T. R. 234; *Doe v. Cartwright*, Ry. & M. 62; 1 C. & P. 218, S. C.

¹⁰ *Swift v. M'Tiernan*, 11 Ir. Eq. R. 602, per Brady, Ch.; *Welland v. Ld. Middleton*, id. 603, per Sugden, Ch.; 15 & 16 V., c. 63, Ir.; 23 & 24 V., c. 4, § 9, Ir.

¹¹ *R. v. Martin*, 2 Camp. 100.

¹² *Arnold v. Bp. of Bath and Wells*, 5 Bing. 316; *Coombs v. Coether*, M. & M. 398; *Humble v. Hunt*, Holt, N. P. R. 601.

¹³ B. N. P. 248; 1 St. Ev. 239.

¹⁴ *Salte v. Thomas*, 3 B. & P. 188; *R. v. Aickles*, 1 Lea. 391.

¹⁵ *D'Israeli v. Jowett*, 1 Esp. 427; *Watson v. King*, 4 Camp. 275; *R. v. Fitzgerald*, 1 Lea. 20; *R. v. Rhodes*, id. 24; *Barber v. Holmes*, 3 Esp. 190. Most of these documents are now lodged at the Record Office. See ante, § 1485.

¹⁶ *Richardson v. Mellish*, 2 Bing. 241, per Best, C. J.

¹⁷ *Wallace v. Cook*, 5 Esp. 117.

¹⁸ 17 & 18 V., c. 104, §§ 280—287.

the coastguard, showing the state of wind and weather;¹ some of the documents relating to the election of members of Parliament;² the registers of Parliamentary voters which are in the custody of the sheriffs or returning officers;³ the books which contain the official proceedings of corporations, and matters respecting their property, if the entries are of a public nature;⁴ and the books and other official papers kept at the Custom-House;⁵ at the office of Inland Revenue,⁶—which includes what were formerly the Excise⁷ and the Stamp offices,—at the Post-Office, and at the Register-Offices of merchant seamen,⁸ of joint stock companies,⁹ and of copyright;¹⁰ and, in short, the official documents belonging to all other public offices. It will presently be seen, when the proof of public documents by examined or certified copies is discussed,¹¹ that this list might be much enlarged; but, in order to avoid repetition, no other instances are here given.

§ 1596. The most satisfactory mode of proving official registers & 1434 and other public documents of a like nature, is by *producing* the books or documents themselves, and showing that they come from the proper *repository*.¹² In some few cases this is the *only legitimate mode of proof*. Thus, the books of companies subject to the provisions of the Companies Clauses Consolidation Act, in which are entered the proceedings of the directors, of the committees of directors, and of the meetings of the company, and each entry in

¹ The Catherina Maria, 1 Law Rep., Adm. & Ecc. 53.

² See 35 & 36 V., c. 33. Sch. 1, Part 1, r. 42.

³ Reed v. Lamb, 29 L. J., Ex. 452; 6 H. & N. 75, S. C.; 6 & 7 V., c. 18, §§ 48, 49.

⁴ Marriage v. Lawrence, 3 B. & A. 142; R. v. Mothersell, 1 Str. 93; Thetford's case 12 Vin. Abr. 90, pl. 16; Warriner v. Giles, 2 Str. 954; id. 1223, n. 1.

⁵ Johnson v. Ward, 6 Esp. 48; Tomkins v. Att.-Gen., 1 Dow, 404; Buckley v. U. S., 4 Howard, S. Ct. R. 258. ⁶ 12 & 13 V., c. 1, § 6.

⁷ Fuller v. Fotch, Carth. 346; R. v. Grimwood, 1 Price, 369.

⁸ 17 & 18 V., c. 104, §§ 271, 277, cited post, p. 1373, n. 4.

⁹ 25 & 26 V., c. 89, § 174, r. § 5.

¹⁰ 5 & 6 V., c. 45, § 11, cited ante, § 1511, n. 4; and 7 & 8 V., c. 12, § 8.

¹¹ See post, §§ 1600—1608.

¹² Atkins v. Hatton, 2 Anst. 387; Armstrong v. Hewett, 4 Price 216; Pulley v. Hilton, 12 Price, 625; Swinnerton v. M. of Stafford, 3 Taunt. 91. See ante, § 432, et seq.; and § 659, et seq.; and Croughton v. Blake, 12 M. & W. 208, as to the repository.

which must purport to be signed by the chairman of the meeting, cannot be proved by copies, however authentic;¹ neither can the books of the proceedings of companies, to which the Companies Act of 1862 applies, be proved by copies, but the books themselves must be produced, when, if the minute sought to be read purports to be signed by the chairman either of the meeting to which it relates, or of the next succeeding meeting, it will be received as *prima facie* evidence.² So, the orders and other documents, which have proceeded from the old³ commissioners of railways, must, it seems, be proved by the production of the originals purporting to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of that body;⁴ while such documents as

¹ 8 & 9 V., c. 16, § 98, enacts, that "the directors shall cause notes, minutes, or copies, as the case may require, of all appointments made or contracts entered into by the directors, and of the order and proceedings of all meetings of the company, and of the directors and committees of directors, to be duly entered in books, to be from time to time provided for the purpose, which shall be kept under the superintendence of the directors; and every such entry shall be signed by the chairman of such meeting; and such entry so signed shall be received as evidence in all courts, and before all judges, justices, and others, without proof of such respective meetings having been duly convened or held, or of the persons making or entering such orders or proceedings being shareholders or directors or members of committees respectively, or of the signature of the chairman, or of the fact of his having been chairman, all of which last-mentioned matters shall be presumed, until the contrary be proved." The Act of 13 & 14 V., c. xxxiii., called "The Railway Clearing Act, 1850," contains, in § 18, a precisely similar clause with respect to entries made in the books of the Clearing Committee.

² 25 & 26 V., c. 89, § 67, enacts, that "every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books, to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be receivable in evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company, or meeting of directors or managers, in respect of the proceedings of which minutes have been so made, shall be deemed to have been duly held and convened, and all resolutions passed thereat, or proceedings had, to have been duly passed and had." But see as to the proof of other documents registered under the Companies Acts, post, § 1603; also, as to certificates of incorporation under the same Acts, § 1630.

³ 14 & 15 V., c. 64, § 1.

⁴ 9 & 10 V., c. 105, § 4, enacts, that "the commissioners of railways shall cause a seal to be made for the purposes of their commission, and all orders

proceed from the present commissioners,—though probably not provable by copies,—will be received in evidence without any seal, so long as they purport to be signed by any one of such commissioners.¹ The same law would appear to extend to all documents relating to railways which now emanate from the Board of Trade, and which must purport to be signed by one of the secretaries or assistant secretaries of the Board, or by some officer appointed by the Board to sign such documents.²

§ 1596A. It is also apprehend that all orders authorised by the Army Act, 1881, “to be made by the Commander-in-Chief or the Adjutant-General, or by the Commander-in-Chief or Adjutant-General of the forces in India, or in any Presidency in India, or by any general or other officer commanding,” must be produced when required as evidence; but any “such order may be signified by an order, instruction, or letter under the hand of any officer authorised to issue orders on behalf of such” superior officer; and any such document purporting to be so signed shall be evidence of the party signing being so authorised.³ Again, any letter, return, or other document respecting the service, non-service, or discharge of any person as a soldier or marine, is made, by the Army Act, 1881, evidence of the facts stated in such letter, return or document, provided that, on production, it purports to be signed by or on behalf of a secretary of state, or of the Commissioners of the Admiralty, or by the commanding officer of any portion of Her Majesty’s

and other documents proceeding from the said commissioners, and purporting to be sealed or stamped with the seal of the said commissioners, and signed by two or more of the said commissioners, shall be received as evidence of the same respectively in all courts, and before all justices and others, without any further proof thereof.”

¹ 36 & 37 V., c. 48, § 30, enacts, that, “every document purporting to be signed by the commissioners, or any one of them, shall be received in evidence without proof of such signature, and, until the contrary is proved, shall be deemed to have been so signed, and to have been duly executed or issued by the commissioners.”

² 14 & 15 V., c. 64, § 3; 31 & 32 V., c. 119, §§ 39 & 47, & Sch. 2. This last Act repeals 7 & 8 V., c. 85, § 23, which made certain documents of the Board of Trade relating to railways provable by “certified copies.”

³ 44 & 45 V., c. 58 § 172, subs. 1.

forces, or of any of Her Majesty's ships, to which such person appears to have belonged, or alleges that he belongs, or had belonged.¹ So, also, any descriptive return within the meaning of § 154 of the Army Act, 1881, must be produced as an original document, but it will be evidence of the matters therein stated, if it purport to be signed by a justice of the peace.²

§ 1597. Most of the documents relating to merchant shipping, § 1435 which are issued by the Board of Trade, must be proved by the production of the originals; for the Merchant Shipping Act of 1854³ contains no provision for rendering copies of such papers admissible in evidence, but merely enacts, in § 7, that "All documents whatever purporting to be issued or written by or under the direction of the Board of Trade, and purporting either to be sealed with the seal of such board, or to be signed by one of the secretaries or assistant secretaries to such board, shall be received in evidence, and shall be deemed to be issued or written by or under the direction of the said board, without further proof, unless the contrary be shown."⁴ So, any document drawn up in pursuance of the 1st Schedule of the Sea Fisheries Act, 1883, though admissible as evidence of the facts or matters therein stated, cannot, as it would seem, be proved by a copy however authentic; but under certain circumstances the facts contained in it may be certified officially, and such certificate will then become evidence without proof of the signature.⁵ Again, it would seem that none of the rules, regulations, certificates, notices or other documents, which are made or issued by the Incorporated Law Society, can be proved, in the first instance, by means of copies, though "The Solicitor's Act 1877," contains some special provisions respecting such documents, expressly enacting that they may be made by the council on behalf of the Society,⁶ and that they "may be in writing or print, or partly in writing,

¹ 44 & 45 V., c. 58, § 163, subs. 1 (*b*).

² *Id.* § 163, subs. 1 (*i*), and Sch. 4.

³ 17 & 18 V., c. 104.

⁴ See, however, 25 & 26 V., c. 63, § 26, as to the proof of the regulations in force for preventing collisions at sea, cited post, § 1604.

⁵ 46 & 47 V., c. 22, § 17. This sect. is a curious specimen of legislative enactment.

⁶ 40 & 41 V., c. 25, § 19.

and partly in print, and may be signed on behalf of the Society by the secretary, or by such other officer or officers of the Society as may be from time to time prescribed by the council."¹ So, the minutes of proceedings of the Metropolitan Board of Works, which are rendered admissible in evidence by the Act of 18 & 19 V., c. 120, provided they purport to be signed by any two of the members present, must be themselves produced;² and a similar rule applies to the books containing entries of all the orders and proceedings of the commissioners of public baths, which may be read as evidence, if they purport to be signed by any two commissioners.³ So, in criminal proceedings, the non-parochial registers deposited with the Registrar-General, must, in order to be used in evidence, be produced to the court.⁴ So, as it would seem, must the daily books of public prisons.⁵

§ 1598. To the above list might be added several other books and documents of a semi-public nature, which are rendered admissible in evidence by the statute law; but still, as a general rule, this strictness of proof is not now required; and indeed, the public inconvenience that would follow the removal of *books of general* § 1436

¹ 40 & 41 V., c. 25, § 20.

² § 60 enacts, that "entries of all proceedings of the Metropolitan Board of Works, and every such district board, and of any such vestry, with the names of the members who attend such meeting, shall be made in books to be provided and kept for that purpose, under the direction of the board or vestry, and shall be signed by the members present, or any two of them; and all entries purporting to be so signed shall be received as evidence, without proof of any meeting of the board or vestry having been duly convened or held, or of the presence at any such meeting of the persons named in any such entry as being present thereat, or of such persons being members of the board or vestry, or of the signature of any person by whom any such entry purports to be signed, all which matters shall be presumed until the contrary be proved." See *Hunnings v. Williamson*, L. R., 11 Q. B. D. 533.

³ 9 & 10 V., c. 74, § 13, enacts, that "all orders and proceedings of the commissioners shall be entered in books to be kept by them for that purpose, and shall be signed by the commissioners, or any two of them; and all such orders and proceedings so entered and purporting to be so signed, shall be deemed to be the original orders and proceedings; and such books may be produced and read as evidence of all such orders and proceedings, upon any appeal, trial, information, or other proceeding, civil or criminal, and in any court of law or equity whatsoever."

⁴ 3 & 4 V., c. 92, § 17, cited post, p. 1370, note. As to what these registers contain, see ante, p. 1291, n. 5.

⁵ *Salte v. Thomas*, 3 B. & P. 190, 191, per Ld. Alvanley.

concernment, has been felt to be so great, as to justify, and in some cases to compel, the introduction of secondary evidence.¹ Such books belong to a particular custody, from which they are not usually taken but by special authority, granted only in cases where inspection of the book itself is necessary for the purpose of identifying it or of determining some question arising upon the original entry, or of correcting an error, which has been duly ascertained. As, therefore, these books are, in general, not removable at the call of individuals, and as, moreover, being interesting to many persons, they might be required as evidence in different places at the same time, it has become a common law axiom of almost universal application, that *whenever a book is of such a public nature as to be admissible in evidence on its mere production from the proper custody, its contents may be proved by an authentic copy.*² So anxious are the judges not to break upon this rule, founded as it is on public convenience, that even though the original document be in court, they will not require its production, but will admit the copy, provided its authenticity be established.³

§ 1599. Now, an *examined copy*, duly made and sworn to by a § 1437 competent witness, has ever been considered as “authentic,” within the meaning of the above axiom;⁴ but the Legislature has also provided a more simple mode of proof, namely, by the production of a *certified copy*. The enactment by which this salutary change in the law has been effected, is contained in § 14 of Lord Brougham’s Evidence Act of 1851,⁵ and is in the following words:—“Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties

¹ *Mortimer v. McCallan*, 6 M. & W. 67, per Ld. Abinger.

² *Lynch v. Clerke*, 3 Salk. 154, per Holt, C. J.; 2 Doug. 593, n. 3; *R. v. Hains*, Comb. 337; *Hoe v. Nathrop*, 1 Ld. Ray. 154.

³ *Marsh v. Collnett*, 2 Esp. 665, per Ld. Kenyon. See § 87, ante, as to an analogous rule, in not requiring a subscribing witness to an *ancient* deed or will to be called, even though present in court.

⁴ See *R. v. Mainwaring*, 26 L. J., M. C. 16; 7 Cox. 192; *Dear. & Bell*, 132, S. C.

⁵ 14 & 15 V., c. 99.

authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to a person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four pence for every folio of ninety words." In conformity with this section, a copy of an entry in a local registry of births, certified under the hand of a "deputy superintendent registrar," has been received in evidence;¹ and under the same enactment the now abolished² Clerk of Records and Writs was ordered by the court to furnish certified copies of any bills, answers, and depositions which were in his custody, and which were required to be used on the trial of a cause.³

§ 1600. Among the public books and documents, the contents of which, in the absence of the originals, are now provable under the enactment just cited either by examined or by certified copies, may be mentioned the following:—parish registers;⁴ the deposit and transfer books of the Bank of England,⁵ and of the East India Company;⁶ the books of the Customs, of the office of Inland Revenue,⁷ and of the Post-office;⁸ the rolls of Courts Baron;⁹ assessments of land-tax;¹⁰ Poor Law Valuations in Ireland;¹¹ the

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¹ *R. v. Weaver*, 43 L. J., M. C. 13; 2 Law Rep., C. C. 85; 12 Cox, 527, S. C.

² See 42 & 43 V., c. 78, Sched. 1; and Rules of Sup. Ct., 1883, Ord. LX., R. 3; Ord. LXI., R. 1.

³ *Reeve v. Hodson*, 10 Hare, App. xix., per Wood, V.-C.

⁴ *Doe v. Barnes*, 1 M. & Rob. 386. In *re Porter's Trusts*, 25 L. J., Ch. 688, Wood, V.-C., held that an extract from a parish register, signed by the *curate* of the parish, was admissible. The same point was ruled by the Lords Justices in *re Hall's Estate*, 22 L. J., Ch. 177, though that case is erroneously reported as a decision to the contrary in 2 De Gex, M. & G. 748; 9 Hare, App. 1, p. xvi., S. C. See 52 G. 3, c. 146.

⁵ *Breton v. Cope*, Pea. R. 30; *Marsh v. Collnett*, 2 Esp. 665; *Mortimer v. McCallan*, 6 M. & W. 58.

⁶ 2 Doug. 593, n. 3; *Doe v. Roberts*, 13 M. & W. 532, per Parke, B.

⁷ 12 & 13 V., c. 1, § 6. See 43 & 44 V., c. 19.

⁸ *Mortimer v. McCallan*, 6 M. & W. 68, per Ld. Abinger; *Fuller v. Fotch*, Carth. 346.

⁹ B. N. P. 247. Examined copies of court-rolls are admissible, though they are not the copies delivered to the tenant of the estate; *Breeze v. Hawker*, 14 Sim. 350.

¹⁰ *R. v. King*, 2 T. R. 234. Those in the Record Office must be proved by certified copies, see ante, § 1533.

¹¹ *Swift v. M'Tiernan*, 11 Ir. Eq. R. 602, per Brady, Ch.; *Welland v. Ld. Middleton*, id. 603, per Sugden, Ch.

books of entry, records, deeds, instruments, writings, maps, plans, and other official papers deposited in the office of land revenue records and enrolments;¹ probably, poor-rate books;² perhaps, rate books kept by the Local Authorities under the Public Health Act, 1875;³ the by-laws of a railway company, made pursuant to the Railways Clauses Consolidation Act;⁴ perhaps the Middlesex registry of deeds;⁵ the Act-book and registers in the registry of the Probate Division;⁶ probably the official log-books kept by the masters of British ships in the manner directed by the Merchant Shipping Act of 1854;⁷ the books of baptisms,⁸ marriages,⁹ and deaths in India which are deposited in the office of the Secretary for India;¹⁰ the register of marriages in the Ionian Islands, which has been transmitted to the Registrar-General by the Lord High Commissioner;¹¹ the registers of marriages kept by British consuls abroad prior to the 28th of July, 1849;¹² and

¹ *Doe v. Roberts*, 13 M. & W. 520; 2 W. 4, c. 1, § 15, et seq.; 7 & 8 V., c. 89. As to the proof of Crown leases, &c., recorded in Scotland, see 36 & 37 V., c. 36, § 5.

² *Justice v. Elstob*, 1 Fost. & Fin. 258, per Hill, J. See, however, 32 & 33 V., c. 41, § 18, cited ante, § 147A.

³ But see 38 & 39 V., c. 55, § 223, which simply enacts, that "the production of the books purporting to contain any rate or assessment made under this Act shall, without any other evidence whatever, be received as *prima facie* evidence of the making and validity of the rates mentioned therein."

⁴ *Motteram v. E. Cos. Ry. Co.*, 29 L. J., M. C. 57; 7 Com. B., N. S. 58, S. C.; 8 & 9 V., c. 20, §§ 108—111, cited post, § 1656.

⁵ *Collins v. Maule*, 8 C. & P. 502, per Tindal, C. J., *Doe v. Kilner*, 2 C. & P. 289.

⁶ See *Davis v. Williams*, 13 East, 232; *Dorret v. Meux*, 15 Com. B. 142. Entries in this book may also be proved by an exemplification; ante, § 1589.

⁷ 17 & 18 V., c. 104, §§ 280—287.

⁸ *Queen's Proctor v. Fry*, L. R., 4 P. D. 230; 48 L. J., P. D. & A. 68, S. C.

⁹ As to Indian marriages solemnised since the 1st Jan. 1852, see 11 & 15 V., c. 40, §§ 21, 22.

¹⁰ *Ratcliff v. Ratcliff and Anderson*, 1 Swab. & Trist. 467, in which case, however, the original book was produced. See, also, Rep. of 1838, by Commiss. appointed to inquire into the state, &c., of non-parochial registers, p. 13.

¹¹ 27 & 28 V., c. 77, §§ 8, 10.

¹² 12 & 13 V., c. 68, § 20, enacts, among other things, that "all marriages, both or one of the parties being subjects or a subject of this realm, which, before the 28th of July, 1849, have been solemnised according to any religious rites or ceremonies, or contracted per verba de presenti in any foreign country or place, and registered by or under the authority of any British consul-general, consul, or vice-consul exercising his functions within such country or place,

foreign registers of marriage, on proof that they are required to be kept by the laws of the countries to which they respectively belong.¹ It would seem that the rules of savings-banks cannot be proved, under Lord Brougham's Act, by certified copies, but that they are provable, either by the production of the originals deposited with the commissioners for the reduction of the national debt, or by examined copies.²

§ 1601. As the section of Lord Brougham's Act, quoted above,³ § 1435 refers only to such documents as are not provable by means of copies under any other statutable provision, it becomes necessary to enumerate the principal public registers and documents, certified copies of which are receivable in evidence, by virtue of some enactment having special reference to them. And here it must be recollected, that the mode of proof afforded by these particular statutes has been much simplified by the Documentary Evidence Act of 1845; and that provided the certified copies respectively *purport* to be duly signed or sealed, or otherwise authenticated in the manner pointed out by statute, they will in almost every case be now admitted in evidence, without proof of the seal, the signature, or the official character of the party certifying.⁴

§ 1602. The following list,—contained in this and the next seven § 1440 sections,—will, it is hoped, be found practically useful, as it refers to the principal documents which are provable by means of *certified copies under particular Acts* of Parliament.⁵ The registers of births, marriages, and deaths, made pursuant to the Registration

the signatures of the parties being written in the register, shall be deemed and held to be as valid in the law, and cognisable in the like manner, as if the same had been solemnised within her Majesty's dominions with a due observance of all forms required by law."

¹ *Abbott v. Abbott and Godoy*, 29 L. J., Pr. & Mat. 57; 4 Swab. & Trist. 254, S. C.

² 26 & 27 V., c. 87, § 4. "The copy of such rules deposited with the said commissioners, or a true copy thereof, examined with the original, and proved to be a true copy, shall be received as evidence of such rules respectively in all cases."

³ Ante, § 1599.

⁴ 8 & 9 V., c. 113, § 1; cited ante, § 7.

⁵ As to when certified copies of enrolments of instruments are admissible in evidence, see post, §§ 1649—1654.

Act of 1836,¹ as amended by the "Births and Deaths Registration Act, 1874;"² the register books kept under the Registration of Burials Act, 1864;³ the non-parochial registers of births, baptisms, marriages, deaths, and burials, which are deposited in the office of the Registrar-General, and certified extracts from which are admissible, under certain regulations, as to notice, &c., in all civil proceedings,⁴ though in criminal cases the original register must be

¹ 6 & 7 W. 4, c. 86, § 38, enacts, that "the Registrar-General shall cause to be made a seal of the said register office, and the Register-General shall cause to be sealed or stamped therewith all certified copies of entries given in the said office; and *all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry; and no certified copy, purporting to be given in the said office, shall be of any force or effect, which is not sealed or stamped as aforesaid.*" See, also, § 35, cited ante, p. 1290, n. 2, which authorises the clergyman, superintendent registrar, and other officers, to give certified copies of the *local registers*; but as the Act contains no provision for making such copies evidence, it may be doubtful whether they would be admissible, were it not for the Act of 14 & 15 V., c. 99, § 14, cited ante, § 1599. See *R. v. Mainwaring*, 26 L. J., M. C. 10; 7 Cox, 192; *Dear. & Bell*, 132, S. C.; *R. v. Weaver*, 43 L. J., M. C. 13; 2 Law Rep., C. C. 85; 12 Cox, 527, S. C.

² 37 & 38 V., c. 88, § 32, cited ante, p. 1290, n. 2.

³ 27 & 28 V., c. 97, §§ 5, 6.

⁴ 3 & 4 V., c. 92, § 9, enacts, that "the Registrar-General shall certify all extracts which may be granted by him from the registers or records deposited, or to be deposited, in the said office, and made receivable in evidence by virtue of the provisions herein contained, by causing them to be sealed or stamped with the seal of the office; and all extracts purporting to be stamped with the seal of the said office shall be received in evidence in all cases, instead of the production of the original registers or records containing such entries, subject nevertheless to the provisions hereinafter contained."

§ 10 enacts, that "every extract granted by the Registrar-General from any of the said registers or records, shall describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited in the general register office under this Act; and the production of any of the said registers or records from the general register office, in the custody of the proper officer thereof, or the production of any certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the said office, shall be sufficient to prove that such register or record is one of the registers and records deposited in the general register office under this Act, in all cases in which the register or record, or any certified extract therefrom, is herein respectively declared admissible in evidence."

§ 11 enacts, that "in case any party shall intend to use in evidence on the trial of any cause in any of the *courts of common law*, [qu. as to the meaning of these words since the passing of the Judicature Acts] or on the hearing of any matter which is not a criminal case, at any session of the peace in England or Wales, any extract, certified as hereinbefore mentioned, from any such register or record, he shall give notice in writing to the opposite party, his

produced;¹ the registers, muster rolls, and pay lists, transmitted attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing, and at the same time shall deliver to him, his attorney or agent, a copy of the extract, and of the certificate thereof; and on proof by affidavit of the service or on admission of the receipt of such notice and copy, such certified extract shall be received in evidence at such trial or hearing, if the judge or court shall be of opinion that such service has been made in sufficient time before such trial or hearing, to have enabled the opposite party to inspect the original register or record, from which such certified extract had been taken, or within such time as shall be directed by any rule to be made as hereinafter provided."

§ 12 enacts, that "in case any party shall intend to use in evidence on such trial or hearing any original register or record (instead of such certified extract), he shall nevertheless, within a reasonable time, give to the opposite party notice of his intention to use such original register or record in evidence, and deliver to such opposite party a copy of a certified extract of the entry or entries, which he shall intend to use in evidence."

§ 13 enacts, that "in case any party shall intend to use in evidence on any examination of witnesses, or at the hearing of any cause, in any *court of equity* [qu. as to the meaning of these words since the passing of the Judicature Acts], any extract, certified as hereinbefore mentioned, he shall, ten clear days at the least before publication shall pass in any cause, where no commission has issued for the examination of the witnesses of the party intending to give such evidence, or where such commission shall issue, then seven clear days at the least before the opening of such commission, deliver to the clerk or clerks in court of the opposite party or parties a notice in writing of his intention to use such certified extract in evidence, on the examination of witnesses or at the hearing of a cause (as the case may be), and shall at the same time deliver to the clerk or clerks in court of the opposite party or parties a copy or copies of such extract, and of the certificate thereof, and thereupon such certificated extract shall be received in evidence: Provided that at the hearing of the cause the service of such certified copy and notice be admitted or proved by affidavit."

§ 14 enacts, that "in case any party shall intend to use in evidence, on such examination or hearing in any *court of equity*, any original register or record (instead of such certificated extract), he shall nevertheless, within the number of days hereinbefore respectively mentioned, deliver to the clerk or clerks in court of the opposite party or parties a notice of his intention to use such original register or record in evidence, together with a copy of a certified extract of the entry or entries which he shall intend to use in evidence."

§ 15 enacts, that "in case any party shall intend to use in evidence, upon any petition, motion, or other interlocutory proceedings in any *court of equity* or in the Master's office, any extract certified as hereinbefore mentioned, he shall produce to the court or Master (as the case may be) an extract, certified as hereinbefore mentioned, accompanied by an affidavit stating the deponent's belief that the entry or entries in the original register or record is correct and genuine."

§ 16 enacts, that "in case any party shall intend to use in evidence in any *Ecclesiastical Court*, or in the High Court of *Admiralty*, any extract, certified

¹ See § 17, cited in next page.

to the Registrar-General of births and deaths in England, in pursuance of "The Registration of Births, Deaths, and Marriages (Army), Act, 1879;"¹ the registers of the marriages of British subjects in foreign countries, which, since the 28th of July, 1849, have been kept by British consuls, and certified copies of which are annually transmitted through one of the Secretaries of State to the Registrar-General;² the registers of births and deaths in Ireland;³ the register books kept under the provisions of the Statute passed in 1854 for the better registration of births, deaths, and marriages in Scotland;⁴ the register of irregular Scotch marriages;⁵ and the register of marriages in Ireland, deposited in the general register office, at Dublin.⁶

as hereinbefore mentioned, he shall plead and prove the same in the same manner to all intents and purposes as if the same were an extract from the parish register, save and except that any such extract, certified as hereinbefore mentioned, shall be pleaded and received in proof without its being necessary to prove the collation of such extract with the original register or record: Provided always, that the judge of the court, on cause shown by any party to the suit (or of his own motion when the proceedings are *in penam*), may, after publication, issue a monition for the production at the hearing of the cause of the original register or record containing the entry to which such certified extract relates."

§ 17 enacts, that "in all *criminal cases*, in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the court the original register or record."

All the above enactments have been extended to the registers deposited under 21 & 22 V., c. 25, by § 3 of that Act.

² 12 & 13 V., c. 68, §§ 11, 12, 18.

¹ 42 V., c. 8.

³ 26 & 27 V., c. 11, § 5, Ir.

⁴ 17 & 18 V., c. 80, § 58, enacts, that "every extract of any entry in the registry books to be kept under the provisions of this Act, duly authenticated and signed by the Registrar-General, if such extract shall be from the registers kept at the general registry office, or by the registrar, if from any parochial or district register, shall be admissible as evidence in all parts of her Majesty's dominions, without any other further proof of such entry." As the Docum. Evid. Act of 1845 does not extend to Scotland, it would seem to be still necessary to prove the signatures and official characters of the persons signing these extracts. See ante, § 7.

⁵ 19 & 20 V., c. 96, § 2, enacts, in substance, that any certified copy of the entry of any irregular marriage in the Scottish register of marriages, shall, if signed by the registrar, be received in evidence of such marriage, and of the residence in Scotland required by the Act, in all courts in the United Kingdom and dominions thereunto belonging. The signature of the registrar seems to require proof. See preceding note.

⁶ 7 & 8 V., c. 81, §§ 52, 71, Ir. This last section is the same as § 38 of (4242)

§ 1603. Next come registers and books kept at the Patent Office, and patents for inventions, specifications, disclaimers, and all other documents in that office, which are provable by printed or written copies or extracts, purporting to be certified by the comptroller, and sealed with the office seal;¹ the documents relating to the election of members of parliament, deposited with the Clerk of the Crown in Chancery,² which, when admissible in evidence at all, may be proved by office copies issued by such clerk;³ the valuation of rateable property in Ireland, and all field-books and documents relating thereto, which are provable by copies or extracts purporting to be signed by the Commissioner of valuations, or by his deputy,⁴ or for the purposes of any proceeding in any Civil Bill Court, by the clerk of the union in the rate-book of which the valuation appears;⁵ the valuation-lists of property in the Metropolis, which may be proved by duplicates or copies certified by the clerk of the assessment committee that approved them;⁶ the documents kept by the registrar of joint-stock companies, copies or extracts from which, certified under the hand of the registrar or his authorised substitute, and sealed with the seal of office, are receivable in evidence;⁷ the reports of inspectors

6 & 7 W. 4, c. 86, cited ante, p. 1368, n. 1, excepting only that it is confined to marriages. See, also, 26 & 27 V., c. 90, Ir.

¹ 46 & 47 V., c. 57, § 89. § 100 of the same Act further provides, that "copies of all specifications, drawings, and amendments left at the Patent Office after the commencement of this Act, printed for and sealed with the seal of the Patent Office, shall be transmitted to the Edinburgh Museum of Science and Art, and to the Enrolments Office of the Chancery Division in Ireland, and to the Rolls Office in the Isle of Man, within twenty-one days after the same shall respectively have been accepted or allowed at the Patent Office; and certified copies of, or extracts from, any such document shall be given to any person requiring the same, on payment of the prescribed fee; and any such copy or extract shall be admitted in evidence in all courts in Scotland and Ireland and in the Isle of Man without further proof or production of the originals."

² See ante, § 1516, n. 6.

³ 35 & 36 V., c. 33, Sch. 1, Part 1, r. 42.

⁴ 23 & 24 V., c. 4, § 9, Ir.

⁵ 40 & 41 V., c. 56, § 32, Ir.

⁶ 32 & 33 V., c. 67, § 64.

⁷ 25 & 26 V., c. 89, § 174, rr. 4, 5, 8. To make assurance doubly sure, the Act of 40 & 41 V., c. 26, enacts, in § 6, that "any copy of or extract from any of the documents or part of the documents kept and registered at any of the offices for the registration of joint stock companies in England, Scotland, or Ireland, if duly certified to be a true copy under the hand of the registrar

appointed under the Companies Act, 1862, which are provable by copies authenticated by the seal of the Company whose affairs have been inspected;¹ the book kept at the Hall of the Stationers' Company, wherein are registered the proprietorships and assignments of copyright in books, and in dramatic and musical pieces, whether printed or in manuscript, and licences affecting such copyright;² the register of proprietors of copyright in paintings, drawings, and photographs, which is also kept at Stationers' Hall;³ the registers authorised to be made in pursuance of the Naturalization Act, 1870, entries in which shall be proved by such certified copies as may be directed by one of the Secretaries of State;⁴ the register of Newspaper proprietors, which is kept by the Registrar of joint-stock companies, and copies of entries in which, certified by the registrar or his deputy, or under the official seal of the registrar, are in all proceedings, civil or criminal, sufficient *prima facie* evidence of all matters thereby appearing;⁵ the registers of licences kept in pursuance of the Act for regulating the sale of intoxicating liquors, which are receivable in evidence of the matters required to be entered therein,⁶ and the entries in which are provable by copies certified to be true, and purporting to be signed by the clerk of the licensing justices.⁷

§ 1604. Again, the registers of British ships, and all declarations § 1440 made under the Merchant Shipping Act of 1854, with respect to the ownership, measurement, and registry of British ships, are respectively provable either by the production of the originals, or by examined copies, or by copies purporting to be certified under the hand of the registrar or other person having the charge of

or one of the assistant-registrars for the time being, and whom it shall not be necessary to prove to be the registrar or assistant-registrar, shall, in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as of equal validity with the original document."

¹ 25 & 26 V., c. 89, § 61.

² 5 & 6 V., c. 45, § 11, cited ante, § 1511, n. 4; add 7 & 8 V., c. 12, § 8.

³ 25 & 26 V., c. 68, §§ 4, 5.

⁴ 33 & 34 V., c. 14, § 12, subs. 4.

⁵ 44 & 45 V., c. 60, § 15.

⁶ 35 & 36 V., c. 94, § 58. See, also, 37 & 38 V., c. 69, §§ 35, 36, Ir.

⁷ Id.

the originals;¹ the regulations for preventing collisions at sea, and the rules concerning lights, fog signals, steering and sailing,² are provable by the production, either of the Gazette in which any order in council concerning them is published, or of a copy of them purporting to be signed by one of the secretaries or assistant secretaries of the Board of Trade, or to be sealed with the seal of the board;³ and copies of the lists and other documents recorded in the General Register and Record Office of Seamen, provided they be certified by the registrar-general of seamen, are admissible in evidence as fully as the originals.⁴

¹ 17 & 18 V., c. 104, § 107, enacts, that "every register of, or declaration made in pursuance of the second part of this Act in respect of, any British ship, may be proved in any court of justice, or before any person having by law or by consent of parties authority to receive evidence, either by the production of the original, or by an examined copy thereof, or by copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original; which certified copies he is hereby required to furnish to any person applying at a reasonable time for the same, upon payment of one shilling for each such certified copy; and every such register or copy of a register, and also every certificate of registry of any British ship, purporting to be signed by the registrar or other proper officer, shall be received in evidence in any court of justice or before any person having by law or by consent of parties authority to receive evidence, as *primâ facie* proof of all the matters contained or recited in such register, when the register or such copy is produced, and of all the matters contained in or indorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar, when such certificate is produced." See 18 & 19 V., c. 91, § 15, which enacts, that "the copy or transcript of the register of any British ship, which is kept by the chief registrar of shipping at the custom-house in London, or by the registrar-general of seamen, under the direction of her Majesty's Commissioners of customs or of the Board of Trade, shall have the same effect to all intents and purposes as the original register of which the same is a copy or transcript." See post, § 1778.

² See Ord. in Coun. of 11th Aug., 1884, which came into operation on 1st Sept., 1884, so far as regards British ships and boats; and Ord. in Coun. of 14th Aug., 1879, which applies to the ships of certain foreign countries. This last Ord. is set out in L. R., 4 P. D. 241; and 49 L. J., Ord. & Rules, p. 1. See also "Rule of the Road at Sea," by Thos. Gray, 4th Ed., 1884.

³ 25 & 26 V., c. 63, § 26. See, also, § 1527, ante.

⁴ 17 & 18 V., c. 104, § 277, enacts, that "all shipping masters and officers of customs shall take charge of all documents which are delivered or transmitted to or retained by them in pursuance of this Act, and shall keep them for such time (if any) as may be necessary for the purpose of settling any business arising at the place where such documents come into their hands, or for any other proper purpose, and shall, if required, produce them for any of such purposes, and shall then transmit them to the registrar-general of seamen, to be by him recorded and preserved; and the said registrar shall, on payment of a moderate fee to be fixed by the Board of Trade, or without

§ 1604A. All records made in regimental books in pursuance of any Act, or of the Queen's regulations, or of military duty, are, by virtue of the Army Act, 1881, rendered admissible in evidence of the facts therein stated, provided they purport to be signed by the commanding officer or by the officer whose duty it is to make them; and a copy of any such record, purporting to be certified by the officer having the custody of such book, is evidence of such record.¹ So, also, all warrants or orders made in pursuance of the Army Act, 1881, by any military authority are "evidence of the matters and things therein directed to be stated," and may be proved by copies purporting to be certified "by the officers therein alleged to be authorised by a Secretary of State or Commander-in-Chief to certify the same."² Again, the attestation paper³ purporting to be signed by a soldier, or his declaration made on re-engagement in any of the regular forces, or on any enrolment in any branch of the service, is evidence of his having given the answers to questions which he is therein represented as having given; and his enlistment may be proved by a copy of his attestation paper, purporting to be certified by the officer having the custody of such document.⁴

§ 1605. The same mode of proof applies to the rules for the management of the property, finances, and civil affairs of Volunteer Corps, which are provable by copies certified under the hands of the respective commanding officers as true copies of the rules whereof her Majesty's approval has been notified;⁵ the rules of

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payment of any fee if the Board of Trade so directs, allow any person to inspect the same, and in cases in which the production of the original of any such document in any court of justice or elsewhere is essential, shall produce the same, and in other cases shall make and deliver to any person requiring it a certified copy of any such document or of any part thereof; and every copy purporting to be so made and certified, shall be received in evidence, and shall have all the effect of the original of which it purports to be a copy." See, also, § 138, cited post, § 1623.

¹ 44 & 45 V., c. 58, § 163, subs. 1 (g) and 1 (h). § 163 of this Act applies to all proceedings under the Reserve Forces Act, 1882, 45 & 46 V., c. 48, § 27; and the Militia Act, 1882, 45 & 46 V., c. 49, § 44, subs. 2.

² Id., § 163, subs. 1 (e).

³ Id., § 80.

⁴ Id., § 163, subs. 1 (a).

⁵ 26 & 27 V., c. 65, § 24. See, also, 36 & 37 V., c. 77, § 22, as to proof of the rules of the Naval Artillery Volunteer Force.

Reformatory schools, which are provable by copies purporting to be signed by the inspector of such establishments;¹ the rules of Industrial schools, which are provable in like manner, excepting that the copies must, as it seems, be in print, and the rules themselves must purport to have been approved in writing by a Secretary of State;² the rules of Loan societies, which may be proved either by the book in which they are entered, or by the transcript deposited with the clerk of the peace, or town clerk, or by an examined copy of such transcript, or by a copy certified by the barrister appointed for that purpose;³ the rules of Building societies, which may be proved by "a printed copy certified by the secretary or other officer of the society to be a true copy of its registered rules;"⁴ and the rules of Friendly societies, which may, as it would seem, be proved by copies purporting to be certified by the central office.⁵

§ 1606. The memorials setting forth the firm names, and the names and places of abode of the members and public officers of banking copartnerships,⁶ which are kept at the Office of Inland Revenue,⁷ may be proved by copies certified under the hand of one of the commissioners of Inland Revenue; the minutes of the orders given by any board of guardians or district board, respecting any complaint, claim, or application made to them, may be proved by a copy purporting to be signed by the chairman of the board, and to be sealed with their seal, and to be countersigned by their clerk;⁸

¹ 29 & 30 V., c. 117, § 33; 31 & 32 V., c. 59, § 29, Ir.

² 29 & 30 V., c. 118, § 29; 31 & 32 V., c. 25, § 23, Ir.

³ 3 & 4 V., c. 110, § 7; 26 & 27 V., c. 56.

⁴ 37 & 38 V., c. 42, § 20.

⁵ See 38 & 39 V., c. 60, § 10, subs. 4; and 18 & 19 V., c. 63, § 30. See, also, § 39 of 38 & 39 V., c. 60, cited post, § 1609.

⁶ 7 G. 4, c. 46, §§ 4, 6.

⁷ 12 & 13 V., c. 1, § 5.

⁸ 7 & 8 V., c. 101, § 69, enacts, that "every copy of a minute of any order, complaint, claim, application, or authority of any such board of guardians or district board, purporting respectively to be signed by the presiding chairman of such guardians or district board, and to be sealed with their seal, and to be countersigned by their clerk, shall, unless the contrary be shown, be taken to be sufficient proof of the directions respecting such order, complaint, claim, or application having been given as alleged in the copy of such minute, and shall be received in evidence accordingly by and before all courts of justice

the orders made by the Lord Chancellor in matters in lunacy, and the reports of the masters in lunacy, confirmed by fiat, may be proved by office copies purporting to be signed by the registrar in lunacy, and to be sealed or stamped with the seal of his office.¹ A variety of other documents filed in lunacy, and enumerated in the Lunacy Orders, 1883, Ord. 109, may be proved by office copies made by the officers in the Master's office; the licences, orders, and instruments, granted, made, issued, or authorised by the Commissioners in Lunacy, in pursuance of the Act of 8 & 9 V., c. 100, may be proved by copies purporting to be sealed or stamped with the seal of the commission;² all orders made by the Commissioners of Public Works in Ireland, by virtue of the Drainage Maintenance Act of 1866, are made provable by copies purporting to be sealed by the commissioners;³ orders and resolutions of the local authorities under the Public Health Act, 1875, or of their committees or and all justices without any proof of the signatures, or of the official characters of the persons signing the same, or of such seal, or of such meeting." This § is not very intelligibly worded, but its substance appears to be as stated in the text.

¹ 16 & 17 V., c. 70, § 100, enacts, that "every order made in a matter in lunacy by the Lord Chancellor intrusted as aforesaid, when drawn up by the registrar in lunacy, and signed by the Lord Chancellor intrusted as aforesaid, shall be entered by the registrar in lunacy in a proper book to be provided by him for that purpose; and he shall furnish office copies of any order, or of any report confirmed by fiat, or of any part thereof respectively, signed by him, and sealed or stamped with the seal of his office, to every party in the matter, or other person entitled thereto, who shall require the same; and every office copy of the whole of any order, or report confirmed as aforesaid, purporting to be so signed and sealed, or stamped with such seal, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted as evidence of the order, or report confirmed as aforesaid, of which it purports to be a copy, without any further proof thereof."

² 8 & 9 V., c. 100, § 7, enacts, that "all such licences, orders, and instruments, or copies thereof, purporting to be sealed or stamped with the seal of the commission, shall be received as evidence of the same respectively, and of the same respectively having been granted, made, issued, or authorised by the commissioners, without any further proof thereof; and no such licence, order, or instrument, or copy thereof, shall be valid, or have any force or effect, unless the same shall be so sealed or stamped as aforesaid." These last words seem to *exclude* all *examined* copies. Some few orders and instruments are exempted from the operation of this section, the Act expressly requiring them to be given or signed and sealed by one commissioner or by two commissioners. See 16 & 17 V., c. 96.

³ 29 & 30 V., c. 49, § 20, Ir.

joint boards, may be proved by copies purporting to be signed by the chairman of their respective meetings;¹ orders or regulations, made or issued by a local authority under "The Contagious Diseases Animals Act, 1874," may be proved by the production of a newspaper purporting to contain a copy of them as an advertisement, or by the production of a copy purporting to be certified as a true copy by the clerk of the local authority;² licences and rules confirmed or made under the Explosives Act, 1875, may be proved by copies certified by a government inspector;³ orders of detention in Industrial schools, which must be signed by two justices or a magistrate, may be proved by copies purporting to be certified by the clerk to the justices or magistrate by whom the same were made;⁴ and the orders of justices for forming a highway district, are provable by copies certified by the clerk of the peace.⁵

§ 1607. The awards and orders made or confirmed by the In. § 1440
closure Commissioners for England and Wales, and other instruments proceeding from their board, may be proved by copies purporting to be sealed with the seal of the board;⁶ the copies of the confirmed awards of the same commissioners, which are deposited with the clerk of the peace of the county where the lands inclosed are situate, are provable by copies or extracts "signed by the clerk of the peace or his deputy, purporting the same to be a true copy;"⁷ the plans and books of reference deposited by railway companies with the clerks of the peace, may be proved by copies or extracts certified by those officers;⁸ the minutes of the proceedings of the Board of Charity Commissioners, and all orders, certificates, and schemes made or approved by them, are provable by copies purporting to be extracted from the books of the board,

¹ 38 & 39 V., c. 55, Sch. 1, R. 1, sub-rule 10, and R. 2, sub-rule 8.

² 41 & 42 V., c. 74, § 44.

³ 38 & 39 V., c. 17, § 60.

⁴ 29 & 30 V., c. 118, § 24; 31 & 32 V., c. 25, § 18, Ir. Warrants of detention in Reformatory Schools cannot, it seems, be proved by copies. See 29 & 30 V., c. 117, § 33; and 31 & 32 V., c. 59, § 29, Ir.

⁵ 27 & 28 V., c. 101, § 12.

⁶ 8 & 9 V., c. 118, § 2.

⁷ 8 & 9 V., c. 118, § 146. See, also, 41 G. 3, c. 109, § 35; and 3 & 4 W. 4, c. 87, §§ 2, 4.

⁸ 8 & 9 V., c. 20, § 10. See post, § 1637.

and to be certified by the secretary;¹ all deeds of exchange made by ecclesiastical corporations under the provisions of the Act for facilitating the exchange of lands lying in common fields, and all leases and other instruments made under the Act for enabling incumbents of ecclesiastical benefices to demise their lands on farming leases, which are respectively entered in the proper ecclesiastical registry, may be proved by office copies certified under the hand of the registrar or his deputy;² all counterparts of leases and other instruments deposited with the Ecclesiastical Commissioners for England, under the provisions of the Act enabling ecclesiastical corporations to grant leases for long terms, are provable by office copies certified under the seal of the commissioners;³ and all agreements and awards, apportionments, maps, or plans,⁴ confirmed by the Tithe Commissioners, and other instruments proceeding from their Board, are provable by copies purporting to be sealed or stamped with the seal of the board.⁵

§ 1608. Again, the order of a general meeting of any company § 1440 subject to the provisions of the Companies Clauses Consolidation Act, authorising the borrowing of any money, is provable by a copy certified to be true by one of the directors or by the secretary;⁶

¹ 16 & 17 V., c. 137, § 8, enacts, that "the said Board shall cause minutes of their proceedings, and all orders, certificates, and schemes made or approved by them under this Act, to be entered in books to be provided and kept for such purpose, and all such entries shall be signed by their secretary; and all copies purporting to be extracted from the books of the said board, and to be certified by their secretary, of any such minutes, orders, certificates, and schemes entered as aforesaid, shall be received as evidence of the proceedings to which such minutes shall relate, and of such orders, certificates, or schemes, and of the making or approval thereof (as the case may require) by the said board, without further proof thereof." See, also, 18 & 19 V., c. 124, §§ 4 & 5, cited ante, p. 12, n. 3.

² 4 & 5 W. 4, c. 30, §§ 10, 11; 5 & 6 V., c. 27, § 14.

³ 5 & 6 V., c. 108, § 29, enacts, that such office copies, "shall, in any action against the lessee, and in all other cases, be admitted and allowed in all courts whatsoever as legal evidence of the contents of such instrument or document, and of the due execution thereof by the parties who on the face of such office copy shall appear to have executed the same, and in the case of any lease, grant, or confirmation, of the due execution by the lessee of the counterpart thereof."

⁴ *Giffard v. Williams*, 38 L. J., Ch. 597.

⁵ 6 & 7 W. 4, c. 71, §§ 2, 64. The tithe commutation maps are not made evidence by this Act of the boundaries of lands as between two proprietors. *Wilberforce v. Hearfield*, 46 L. J., Ch. 584, per Jessel, M. R.; L. R., 5 Ch. D. 709, S. C.

⁶ 8 & 9 V., c. 16, § 40.

all entries made in the registers of common lodging-houses kept under the Public Health Act, 1875,¹ are provable by copies certified to be true by the person having charge of the register;² the licenses granted by the Inspectors of Irish Fisheries for the formation of oyster beds, are provable by copies testified under the hand of the respective clerks of the peace with whom true copies of the originals shall have been lodged;³ the books kept at the office of the Commissioners of the Police of the Metropolis, in which are entered the particulars of the licences granted to the drivers, conductors, and watermen of metropolitan public carriages, and all entries therein, may be proved by copies purporting to be certified by the persons having the charge of the books;⁴ and the duplicates or copies of stage-carriage licences, filed in the Office of Inland Revenue whence the licences issue, are provable by copies purporting to be certified under the hand of one of the Commissioners of Inland Revenue, or of the officer by whom the licence has been granted, or of some other person appointed and authorised by the commissioners in that behalf.⁵

¹ 38 & 39 V., c. 55.

² § 76 enacts, that "a copy of any entry made in such register, certified by the clerk of the local authority to be a true copy, shall be received in all courts and on all occasions as evidence, and shall be sufficient proof of the matter registered, without production of the register, or of any document or thing on which the entry is founded; and a certified copy of any such entry shall be supplied gratis by the clerk to any person applying at a reasonable time for the same." See, also, the Scotch Act, 30 & 31 V., c. 101, § 61.

³ 29 & 30 V., c. 97, § 7 Ir.; amended by 32 & 33 V., c. 92, Ir.

⁴ 6 & 7 V., c. 86, § 16, enacts, that "the particulars of every licence which shall be granted as aforesaid, shall be entered in books to be kept for that purpose at the office of the [Commissioners of the Police of the Metropolis; see 13 & 14 V., c. 7, §§ 1 and 2]; and in all courts and before any justice of the peace, and upon all occasions whatsoever, a copy of any entry made in any such book, and certified by the person having the charge thereof to be a true copy, shall be received as evidence, and be deemed sufficient proof of all things therein registered, without requiring the production of the said book, or of any licence, or of any requisition or other document upon which any such entry may be founded; and every person applying at all reasonable times shall be furnished with a certified copy of the particulars respecting any licensed person without payment of any fee." It is difficult to discover whether the above provision has been affected in any way by the Act of 16 & 17 V., c. 33. See, also, 32 & 33 V., c. 115, §§ 6, 8, 11, 15. The Act of 16 & 17 V., c. 112, contains, in § 12, a somewhat similar enactment as to licences granted to drivers and conductors of public carriages in Dublin.

⁵ 12 & 13 V., c. 1, § 16. See 10 & 11 V., c. 42.

§ 1608A. The inconvenience caused to bankers by constantly having their clerks subpoenaed to produce the books of the firm in courts of justice was, in 1876, felt to be so great, that the Legislature determined to apply a remedy to the evil. Owing, however, to the draughtsman's want of skill the first attempt ignominiously failed; for the Act, that was passed for the purpose, turned out to be practically inoperative.¹ In 1879 a fresh effort was made, which has met with at least partial success. The law on the subject is now embodied in "The Bankers' Books Evidence Act, 1879,"² which in substance enacts as follows:—1. Subject to the provisions of the Act, a copy of any entry in a banker's book,—which term includes ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank,³—shall, in all legal proceedings, civil or criminal, including arbitrations,⁴ and for or against any one,⁵ be received as *primâ facie* evidence of such entry, and of the matters, transactions and accounts therein recorded.⁶ But such copy cannot be received unless proof be given that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and is in the custody or control of the bank, and that the entry was made in the ordinary course of business.⁷ Such proof may be given by a partner or officer of the bank, and either orally or by affidavit.⁸ The copy must also be an *examined* copy, and proof of that fact "*shall* be given by some person who has examined the copy with the original entry," and *may* be given either orally or by affidavit.⁹ Sect. 6 then goes on to enact, that "A banker or officer of a bank shall not, in any legal proceeding to which the *bank is not a party*, be compellable to produce any banker's book," or to appear as a witness to prove the matters therein recorded, unless by order of a judge¹⁰ made for special cause.¹¹ Under Sect. 7 the court or judge is empowered,

¹ 39 & 40 V., c. 48; repealed by 42 V., c. 11, § 2.

² 42 V., c. 11.

³ 42 V., c. 11, § 9.

⁴ § 10.

⁵ *Harding v. Williams*, L. R., 14 Ch. D. 197, per Fry, J.; 49 L. J., Ch. 661, S. C. ⁶ § 3. ⁷ § 4. ⁸ § 4. ⁹ § 5.

¹⁰ This term includes the judge of a county court with respect to any action in such court. § 10.

¹¹ The costs of such an order are "in the discretion of the court or judge." § 8.

on the application of any party to a legal proceeding, to order¹ “that such a party be at liberty to inspect and take copies of any entries in a banker’s book for any of the purposes of such proceedings;” and any such order may be made with or without summoning the bank or any other party,² “and shall be served on the bank three clear days³ before the same is to be obeyed, unless the court or judge otherwise directs.” It only remains to observe that this statute applies to all ordinary banks, all savings banks, all post-office saving banks,⁴ and all companies carrying on the business of bankers to which the Companies Acts, 1862 to 1880, apply, provided these last have duly furnished to the registrar of joint-stock companies the prescribed lists and summaries;⁵ and that it endeavours,—with very questionable success,—to facilitate, in Sect. 9, the proof of “any person, persons, partnership, or company” being included within any one of these categories.⁶

§ 1609. “The Friendly Societies Act, 1875,” contains a peculiar clause with respect to documentary evidence; for instead of adopting the almost stereotyped form of rendering admissible the certi-

¹ See *Davies v. White*, 53 L. J., Q. B. 275, as to what affidavit will be required in support of the application for the order.

² Notwithstanding these general words, an order to inspect will not be granted *ex parte* in any *civil* proceeding. See *Davies v. White*, 53 L. J., Q. B. 275.

³ Exclusive of Sunday, Christmas Day, Good Friday, and any Bank Holiday. § 11.

⁴ § 9.

⁵ 45 & 46 V., c. 72, § 11 subs. 2.

⁶ § 9 is as follows:—“In this Act the expressions ‘bank’ and ‘banker’ mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post-office savings bank. The fact of any such bank having duly made a return to the Commissioners of Inland Revenue, may be proved in any legal proceeding, by production of a copy of its return verified by the affidavits of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificates; the fact that any such bank is a post-office savings bank may be proved by a certificate, purporting to be under the hand of her Majesty’s Postmaster-General, or one of the secretaries of the post-office.”

fied or examined copies of documents, it enacts, that "Every instrument or document, copy or extract of an instrument or document, bearing the seal or stamp of the central office, shall be received in evidence without further proof:" and it then goes on to provide that "every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor or valuer under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature."¹ It will be noted that this last provision is confined to *original* documents, and that copies or extracts,—to become admissible under the Act,—must, as it would seem, be sealed in accordance with the first paragraph of the section.

§ 1610. The proof of *certificates* is much simplified by the Documentary Evidence Act, 1845; for if they *purport* to be verified in the manner pointed out by the statute which renders them admissible, they will be received in evidence without proof of the seal, the signature, or the official character of the party verifying them.² Still, as the language of the Legislature varies much in fixing the mode by which particular certificates are authenticated, it will be convenient briefly to notice those statutes which relate to certificates of the most general importance.³ § 1441

§ 1611. First, all boards of guardians, or district boards, are authorised to make *certificates* of the *chargeability* of any paupers, and if these documents substantially follow the form given by the Act of 7 & 8 V., c. 101, and purport to be signed by the chairman of the respective boards, to be sealed with their seals, and to be countersigned by their clerk, they are *prima facie* evidence of the truth of all statements contained therein; and no other proof of chargeability is required for the purpose of making any order of § 1442

¹ 38 & 39 V., c. 60, § 39. The principal documents under this Act are exempt from stamp duty, § 15, subs. 2.

² 8 & 9 V., c. 113, § 1; cited ante, § 7.

³ As to certificates under the Bankruptcy Act, 1883, see ante, § 1549, and post, §§ 1748, 1750. As to certificates of the acknowledgment of deeds by married women, see ante, § 1540.

charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient¹ that it be certified or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.”²

§ 1613. As the above general provision was not considered by the technical lawyers as sufficiently comprehensive, another attempt to meet the difficulty was made by Parliament in 1871, and will be found embodied in the 18th section of the Prevention of Crimes Act of that year.³ The section is amusing, as, for some unaccountable reason, it ignores the possibility of any proof of an *acquittal* being required. The enactment is as follows:—“A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity⁴ of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court⁵ by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary con-

¹ See ante, § 1573, ad fin.

² See 28 & 29 V., c. 18, § 6, cited ante, § 1437, which regulates the proof of certificates of conviction, when produced for the purpose of discrediting witnesses. See, also, 17 & 18 V., c. 125, § 25, and 19 & 20 V., c. 102, § 28, Ir.

³ 34 & 35 V., c. 112.

⁴ See *R. v. Levy*, 8 Cox, 73. Photography affords an easy mode of establishing this identity. See *Beamish v. Beamish*, 1 R., 10 C. L. 413; *R. v. Tolson*, 4 Fost. & Fin. 103.

⁵ See *R. v. Parsons*, 35 L. J., M. C. 167; 1 Law Rep., C. C. 24; 10 Cox, 243, S. C.

viction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same. A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof. A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section. The mode of proving a previous conviction authorised by this section shall be in addition to, and not in exclusion of, any other authorised mode of proving such conviction.”¹

§ 1614. Under the Army Act, 1881, no person subject to military law, who has been acquitted or convicted of any offence either by a court-martial, or by a competent civil court, is liable to be tried again by a court-martial in respect of the same offence;² and when any such person has been tried by a civil court, the clerk, or his deputy, or other officer having the custody of the records of such court, must, if required by the commanding officer of the accused, or by any other officer, transmit to him a certificate setting forth the offence for which the accused was tried, together with the judgment, whether of conviction or of acquittal; and any such certificate—for which a fee of three shillings is allowed to the officer—is

¹ The principal Acts here alluded to are 7 & 8 G. 4, c. 28, § 11; 14 & 15 V., c. 100, § 22; 24 & 25 V., c. 96, § 116; 24 & 25 V., c. 99, § 37; and 5 G. 4, c. 84, § 24. See, also, 34 & 35 V., c. 112, §§ 9, 20; and Lond. School Board v. Harvey, L. R., 4 Q. B. D. 451; 48 L. J., M. C. 131, S. C. cited ante, § 1572. 44 & 45 V., c. 58, §§ 157, 162, subs. 6.

rendered by the statute “sufficient evidence of the conviction and sentence, or of the acquittal.”¹

§ 1614A. If any prosecution or action be commenced against any person for any offence committed in violation of the Corrupt and Illegal Practices Act, 1883, the certificate of the returning officer that the election was duly held, and that the person named in the certificate was a candidate, “shall be sufficient evidence of the facts therein stated.”²

§ 1615. Justices in petty sessions are now empowered by statute 42 & 43 V., c. 49, to deal summarily with many indictable offences, provided the persons accused consent to such a mode of trial;³ and if, in any such case, the court think fit to dismiss the information, “they shall, if required, deliver to the person charged a copy certified under their hands of the order of such dismissal, and such dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence.”⁴ The Act of 1848, which regulates the duties of justices out of sessions with respect to summary convictions and orders, contains a similar provision for granting⁵ certificates of dismissal; but here, as in all cases of this nature, it must be remembered that these certificates merely constitute a convenient mode of proving dismissals, and that the party acquitted may still establish the fact of his discharge by any other species of legal evidence.⁶

§ 1616. Under the Act 24 & 25 V., c. 100, §§ 42 and 43, two § 1447 justices are empowered to hear cases of *common assault or battery*; and also cases of aggravated assaults on boys not exceeding fourteen

¹ § 164. This sect. has been applied to the Reserve Forces, by 45 & 46 V., c. 48, § 27; and to the Militia, by the Militia Act, 1882, 45 & 46 V., c. 49, § 44, subs. 1. See, also, 26 & 27 V., c. 65, § 29, and 32 & 33 V., c. 81, § 5, which, read together, empower justices to receive proof of a previous conviction by means of a *certified copy*, in the event of the offender being again charged with buying, selling, pawning, or taking in pawn, any arms, clothing, or other public stores, from volunteers.

² 46 & 47 V., c. 51, § 53, subs. 3.

³ §§ 10—14.

⁴ § 27, subs. 4.

⁵ 11 & 12 V., c. 43, § 14.

⁶ *R. v. Hutchins*, L. R., 5 Q. B. D. 353; 49 L. J., M. C. 64, S. C.

years of age, and on females; and if upon the hearing of any such case they "shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a *certificate under their hands* stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."¹ § 45 then provides, that the person obtaining such certificate shall be released from all proceedings, civil² or criminal,³ for the same cause. It seems, that a certificate under this Act should specify the ground of dismissal,⁴ and should be given within a reasonable time after the hearing,⁵ if not before the justices separate;⁶ and it has also been held, that, in order to take advantage of the certificate, the defendant must plead it specially.⁷

§ 1618. Under the Industrial Schools Act, 1866, justices are § 1448A empowered to send certain vagrant and destitute children to these establishments; and a certificate purporting to be signed by one of the managers of such a school, or the secretary, or by the superintendent or other person in charge of the school, to the effect that the child therein named was duly received into, and is at the signing thereof detained in, the school, or has been duly discharged

¹ 24 & 25 V., c. 100, § 44.

² See *Tunncliffe v. Tedd*, 5 Com. B. 553. There, the complainant, after summons, declined to proceed, saying he meant to bring an action, and the justices dismissed the complaint, stating in the certificate that they did so as the complainant offered no evidence. The court held that the certificate was a bar to the action. See, also, *Vaughton v. Bradshaw*, 9 Com. B., N. S. 103, S. P.; S. C., nom. *Bradshaw v. Vaughton*, 30 L. J., C. P. 93.

³ See post, § 1710.

⁴ *Skuse v. Davis*, 10 A. & E. 635; 2 P. & D. 550; 7 Dowl. 774, S. C.; *Holden v. King*, 46 L. J., Ex. 75.

⁵ See *Hancock v. Somes*, 8 Cox, 172; 1 E. & E. 795, S. C.; *Coster v. Hetherington*, 8 Cox, 175; 1 E. & E. 802, S. C.; *Christie v. Richardson*, 10 M. & W. 688.

⁶ Compare *R. v. Robinson*, 12 A. & E. 672; 4 P. & D. 391, S. C.; with *Thompson v. Gibson*, 8 M. & W. 285, 286.

⁷ *Harding v. King*, 6 C. & P. 427, per Gurney, B. See, also, *Skuse v. Davis*, 10 A. & E. 635; and *R. v. Sidney Westley*, 11 Cox, 139.

or removal or otherwise disposed of, shall be evidence of the matters therein stated.¹

§ 1619. *Certificates of indemnity* are sometimes granted to witnesses, who make full disclosures respecting corrupt practices at elections for members of Parliament, gaming, and other illegal transactions; and then, in the event of any ulterior proceedings being instituted against such witnesses, the certificates will constitute a valid defence, and will be received in evidence on their mere production, provided that they be drawn up in the proper form, and that the purport to be signed by the persons who are respectively authorised to grant them.² § 1449

§ 1620. Under the Reformatory Schools Act, 1866, the Home Secretary may, by writing under his hand, certify that any school is fitted for the reception of youthful offenders; and the grant of every such certificate may be proved by the production either of the certificate itself, or a copy of the same, purporting to be signed by the Inspector of Reformatory Schools, or of the Gazette containing a notice of such grant.³ The withdrawal of the certificate may also be proved by means of the Gazette.⁴ Somewhat similar provisions are contained in "The Irish Reformatory Schools Act, 1868,"⁵ The Industrial Schools Act, 1866,⁶ and "The Industrial Schools Act, Ireland, 1868."⁷ Special clauses with respect to the proof and admissibility of certificates granted either by the Education Department, or by the principal teacher of a public elementary school, are also to be found in "The Elementary Education Acts, 1870 and 1873."⁸ § 1449A

¹ 29 & 30 V., c. 118, § 30; extended to Ireland by 31 & 32 V., c. 25, § 24, Ir. See, also, as to Reformatory Schools, 29 & 30 V., c. 117, § 33; extended to Ireland by 31 & 32 V., c. 59, § 29, Ir.

² See Acts noticed ante, § 1455; and 8 & 9 V., c. 113, § 1, cited ante, § 7. Under "Parliamentary Elections Act, 1868," 31 & 32 V., c. 125, § 33, "the certificate shall be given under the hand of the judge."

³ 29 & 30 V., c. 117, §§ 4, 33.

⁴ 29 & 30 V., c. 117, § 33.

⁵ 31 & 32 V., c. 59, §§ 4, 5, 29, Ir.

⁶ 29 & 30 V., c. 118, §§ 7, 9, 46.

⁷ 31 & 32 V., c. 25, §§ 6, 8, 36, Ir.

⁸ 33 & 34 V., c. 75, §§ 64, 83; 36 & 37 V., c. 86, § 24, subs. 5.

§ 1621. The Act of 1849 for facilitating the marriage of British subjects resident in foreign countries,¹ contains a very remarkable clause; for,—after authorising British consuls to solemnise and register certain marriages, and after providing that parties guilty of fraud, or of taking false oaths, should respectively be liable to forfeit all property accruing from the marriage, and to be prosecuted for perjury,—it goes on, in § 17, to enact, that in every action or suit for forfeiture, and upon every prosecution for perjury, as aforesaid, “the *declaration* and *certificate* of the consul, under his hand and consular seal, shall be received and taken as good and valid evidence in the law of all facts and matters stated in such declaration and certificate, without it being necessary for the said consul to attend in person to prove the same.” § 1450

§ 1622. Under the Act of 1855 for registering places of worship of dissenters, the Registrar-General is directed, “with respect to any place certified to him as a place of meeting for religious worship, the record whereof remains uncanceled,” to “give any person demanding the same, a certificate, sealed or stamped with the seal of the General Register Office, that, at the time or respective times in such certificate in that behalf stated, the place therein described was duly certified and duly recorded as required by this Act, and that, at the date of such sealed or stamped certificate, the record of such certification remained uncanceled; and every such sealed or stamped certificate, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the said several facts therein mentioned, without any further or other proof of the same.”² The Act, too, of 19 & 20 V., c. 119, contains, in § 24, somewhat similar provisions;³ and a recital in that section furnishes the § 1450A

¹ 12 & 13 V., c. 68.

² 18 & 19 V., c. 81, § 11.

³ The words are as follows:—“The Registrar-General, on payment to him of the several fees hereinafter mentioned, shall allow searches to be made in the returns so made to him as aforesaid, and shall give to any person demanding the same a certified copy thereof, or extract therefrom, with respect to any place of meeting for religious worship contained therein; and every

curious statistical information, that the number of meeting-houses of dissenters recorded in 1852 was little short of fifty-five thousand.

§ 1623. Under the Merchant Shipping Act of 1854, “all documents purporting to be certificates issued by the Board of Trade in pursuance of this Act, and to be sealed with the seal of such board, or to be signed by one of the officers of the marine department of such board, shall be received in evidence, and shall be deemed to be such certificates, without further proof, unless the contrary be shown.”¹ By virtue, too, of the same statute, every certificate of registry of any British ship purporting to be signed by the registrar or other proper officer, is receivable in evidence as *prima facie* proof of all the matters either contained in or indorsed on it, provided they purport to be authenticated by the signature of a registrar.² So, all certificates, whether of competency or of service, granted to the masters or mates of British ships, or to the engineers of British steam-vessels,³ are provable not only by the production of the originals as issued by the Board of Trade, but also *prima facie* by copies, purporting to be certified by the Registrar-General of Seamen, or his assistant, or by such other person as the Board of Trade appoints for that purpose.⁴ § 1451

such certified copy or extract shall be sealed or stamped with the seal of the General Register Office, and when so sealed or stamped as aforesaid, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the place of meeting therein mentioned or described having been at the time in that behalf therein stated duly certified and registered or recorded as by law required, without any further or other proof of the same; and the Registrar-General shall be entitled to demand and receive for every search in the said returns extending over a period of not more than ten years, the sum of one shilling, and for every additional period of ten years the sum of sixpence, and the further sum of two shillings and sixpence for every single certified copy or extract.”

¹ 17 & 18 V., c. 104, § 7.

² § 107, cited ante, § 1604, n. 1. See post, § 1778. As to certificates of desertion from any ship, see § 249 of the Act.

³ 25 & 26 V., c. 63, §§ 5—12.

⁴ 17 & 18 V., c. 104, § 138, enacts that “all certificates, whether of competency or service, shall be made in duplicate, and one part shall be delivered to the person entitled to the certificate, and the other shall be kept and recorded by the Registrar-General of Seamen, or by such other person as the Board of Trade appoints for that purpose; and the Board of Trade shall

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§ 1624. Certificates of naturalization, and of re admission to § 1451A British nationality, as well as all declarations authorised to be made under the Naturalization Act, 1870, may be proved in any legal proceeding by the production of the original documents, or of any copies certified to be true by a Secretary of State, or by some person authorised by such secretary to give them.¹

§ 1624A. Under "The Weights and Measures Act, 1878," an account must now be kept by the Board of Trade of all local standards verified or re-verified of weights and measures; and every indenture of verification or indorsement of re-verification, "if purporting to be signed by an officer of the Board, shall be evidence of the verification or re verification of the weights and measures therein referred to."² When a local standard has been compared, as it may be, by a local authority, the justice, in whose presence the comparison is made, must sign an indorsement on the indenture of verification of that standard, which indorsement must be recorded by the Board of Trade. It will then become "evidence of the local comparison and verification, and a statement of the record thereof, if purporting to be signed by an officer of the Board, shall be evidence of the same having been so recorded."³

§ 1627. Under the House of Lords' and House of Commons' § 1453 Costs Taxation Acts, the Clerk of the Parliaments, or Clerk-Assistant, the Speaker, and the Taxing Officer of the Lower House, are respectively authorised to issue certificates of the amount of

give to such registrar or such other person immediate notice of all orders made by it for cancelling, suspending, altering or otherwise affecting any certificate in pursuance of the powers herein contained, and the registrar or such other person as aforesaid shall thereupon make a corresponding entry in the record of certificates; and a copy purporting to be certified by such registrar, or his assistant, or by such person as aforesaid, of any certificate, shall be *prima facie* evidence of such certificate, and a copy purporting to be so certified as aforesaid of any entry made as aforesaid in respect of any certificate, shall be *prima facie* evidence of the truth of the matters stated in such entry." These provisions are extended to engineers' certificates by 25 & 26 V., c. 63, § 10.

¹ 33 & 34 V., c. 14, § 12.

² 41 & 42 V., c. 49, § 37. See ante, § 144A.

³ § 41. See ante, § 144A.

costs allowed on taxation in respect of private bills; and such certificates are *conclusive* evidence of the amount of such costs in all legal proceedings, and operate on production as warrants of attorney to confess judgment, unless the defendant has in his statement of defence denied his liability to make any payment in respect of them.¹ The Act, too, of 3 & 4 V., c. 9, provides,² that all proceedings, civil or criminal, against any person for the *publication of papers printed by order of Parliament* shall be stayed upon the production of a certificate under the hand of the Lord Chancellor, the Lord Keeper, or the Speaker of the House of Lords for the time being, the Clerk of the Parliaments, the Speaker of the House of Commons, or the Clerk of the same House, stating that such papers were published by order of either House.³

§ 1628. Under the Patents, Designs, and Trade Marks Act, § 1454 1883, the judge before whom any action for infringing a patent shall be tried, may “*certify* that the *validity* of the patent came in question; and if the court or a judge so certifies, then in any subsequent action for infringement, the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses, as between solicitor and client, unless the court or judge trying the action certifies that he ought not to have the same.”⁴

§ 1628A. The same statute⁵ provides, in § 96, that any certificate purporting to be under the hand of the Comptroller-General of Patents, Designs, and Trade Marks, “as to any entry, matter, or thing, which he is authorized by that Act, or any general rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the

¹ 12 & 13 V., c. 78, § 9; 10 & 11 V., c. 69, § 9; 28 & 29 V., c. 27, §§ 3 & 5. The signatures to the certificates under these Acts need not be proved. See 8 & 9 V., c. 113, § 1, cited ante, § 7. See, also, *Williams v. Swansea Canal Navig. Co.*, 3 Law Rep., Ex. 158. ² § 1.

³ The Act adds the words, “together with an affidavit verifying such certificate.” This is not now necessary. See 8 & 9 V., c. 113, § 1, cited ante, § 7.

⁴ 46 & 47 V., c. 57, § 31. See *Honiball v. Bloomer*, 10 Ex. R. 538.

⁵ 46 & 47 V., c. 57.

matter or thing having been done or left undone." The Comptroller is further directed, in § 49, to "grant a certificate of registration to the proprietor of the design when registered."

§ 1629. Under the Charitable Trustees Incorporation Act, 1872, the Charity Commissioners are empowered to grant certificates of incorporation to the trustees of charities established for religious, educational, literary, scientific, or public charitable purposes; and every such certificate shall be *conclusive* evidence that all the preliminary requisitions contained in the Act have been complied with; and the date of incorporation shall be deemed to be that which is mentioned in the certificate.¹

§ 1630. Under § 18 of "The Colonial Stock Act, 1877,"² the registrar of colonial stock is authorised to give to any stockholder certain certificates and lists, furnishing particulars respecting the amount of the debt, the number and names of the stockholders, and other matters, and the Act then provides, that any such certificate or list "shall be admissible in evidence."

§ 1631. Every *certificate of incorporation*, under the Companies Act, 1862, must set forth under the hand of the registrar, or, in his absence, under the hand of such person as the Board of Trade shall for the time being authorise,³ and in either event, as it would seem, under the seal of the registrar's office,⁴ that the company is incorporated, and in the case of a limited company, that the company is limited;⁵ and it will then, without proof of the seal, or of the signature, or of the official character of the person signing it,⁶ be "*conclusive* evidence that all the requisitions of the Act in respect to registration have been complied with."⁷ Where the certificate purports to have been signed by a person whom the

¹ 35 & 36 V., c. 24, §§ 1, 6.

² 40 & 41 V., c. 59.

³ 25 & 26 V., c. 89, § 174, r. 8.

⁴ § 174, r. 4.

⁵ § 18.

⁶ 8 & 9 V., c. 113, § 1, cited ante, § 7.

⁷ 25 & 26 V., c. 89, §§ 18, 192; In re Barnard's Bking. Co., Peel's case, 36 L. J., Ch. 757, per Ld. Cairns; 2 Law Rep., Ch. App. 674, 681, S. C.; Oakes v. Turquand, 2 Law Rep., H. L. 325, 354, 369; 36 L. J., Ch. 949, S. C. in Dom. Proc.

Board of Trade has authorised to act for the registrar, the court, on its being tendered in evidence, will presume that the registrar himself was absent when it was signed, and it is not necessary that that fact should either be stated on the face of the document, or be proved aliunde.¹ The certificate will be equally admissible in evidence to whomsoever it may have been given, and the registrar, on payment of 5s., is bound to issue one to any person who may apply for it.² Moreover, any copy "certificate of the incorporation of any company given by the registrar, or by any assistant registrar for the time being, shall be received in evidence as if it were the original certificate."³ Every *certificate of the proprietorship of shares or stock* in any company registered under the same Act of 1862, must be under the common seal of the company, and must specify the shares or stock held by any member; and it will then be admitted as *primâ facie* evidence⁴ of the title of the member to the shares of stock therein specified.⁵

§ 1632. Very similar provisions are contained in the Companies § 1456
Clauses Consolidation Act as to the certificates of the proprietorship of shares in undertakings subject to that Act, and it is only necessary that these last certificates should be sealed with the seal of the company, and should specify the share to which the holder is entitled.⁶ The same statute provides, that, where by the Special Act

¹ *Baker v. Cave*, 1 H. & N. 674.

² 25 & 26 V., c. 89, § 174, r. 5.

³ 40 & 41 V., c. 26, § 6.

⁴ See *Shropshire Union Rys. & Can. Co. v. R.*, 7 Law Rep., H. L. 496. See, also, *Re British Farmers Pure Lins. Cake Co.*, L. R., 7 Ch. D. 533, per Ct. of App.; 47 L. J., Ch. 415, S. C.

⁵ 25 & 26 V., c. 89, § 31.

⁶ 8 & 9 V., c. 16, § 11, enacts, that "on demand of the holder of any share, the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, and such certificate shall have the common seal of the company affixed thereto; and such certificate shall specify the share in the undertaking to which such shareholder is entitled, and the same may be according to the form in the Schedule A. to this Act annexed, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed, then a sum not exceeding two shillings and sixpence."

§ 12 enacts, that "the said certificate shall be admitted in all courts as *primâ facie* evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless, the

a company shall be restricted from borrowing money on mortgage or bond until a definite portion of their capital has been subscribed or paid up, any justice, upon production to him of the books of the company, and of such other evidence as he shall think sufficient, may grant a certificate that such capital has been subscribed or paid up, and this certificate will be sufficient evidence of the fact stated therein.¹ So, under the Land Clauses Consolidation Act, no company can put in force their compulsory powers of taking land, until the whole capital has been subscribed; but their compliance with this requisite may be proved by a certificate under the hands of two justices, who are authorised to grant it on the application of the promoters, and the production of such evidence as they think sufficient.²

§ 1633. Under "The Friendly Societies Act, 1875," the registrar of such societies,—on being satisfied that a society has complied with the statutory requirements, is directed to issue "an acknowledgment of registry," which shall specify whether the society is a friendly society, a cattle insurance society, a benevolent society, a working men's club, or a specially authorised society; and every such acknowledgment, purporting to bear either the seal or stamp of the central registry office, or the signature of the assistant Registrar for Scotland or Ireland, is conclusive evidence that the society is duly registered, unless it be proved that the registry has been suspended or cancelled.³ The Registrar is further authorised by the same Statute,—on being satisfied that any proposed amendment of a rule of any society is not contrary to the provisions of the

want of such certificate shall not prevent the holder of any share from disposing thereof."

SCHEDULE A.

Form of Certificate of Share.

"Number ———. The ——— Company.

"This is to certify, that A. B., of ———, is the proprietor of the share number ———, of 'The ——— Company,' subject to the regulations of the said company. Given under the common seal of the said company, the ——— day of ———, in the year of our Lord ———."

¹ 8 & 9 V., c. 16, § 10.

² 8 & 9 V., c. 18, §§ 16, 17; *Ystalyfera Iron Co. v. Neath & Brecon Ry. Co.*, 43 L. J., Ch. 476.

³ 38 & 39 V., c. 60, § 11, subs. 7 & 10, and Sch. iv.

Act,—to issue to the society an acknowledgment of registry of the same; and provided such acknowledgment be attested in like manner as an ordinary acknowledgment of registry, it affords conclusive evidence that the amended rule has been duly registered.¹

§ 1634. Under “The Industrial and Provident Societies Act, 1876,” the registrar is also empowered to issue acknowledgments of registry to industrial and provident societies; and every such acknowledgment furnishes conclusive evidence that the society to which it relates is duly registered, unless it be provided that the registry of the society has been suspended or cancelled.²

§ 1635. Under “The Building Societies Act, 1874,” any certificate of incorporation or of registration, or other document relating to a building society, and purporting to be signed by the Registrar, shall, in the absence of any evidence to the contrary, be received by all courts without proof of the signature.³ Again, under “The Trades Union Act, 1971,” the registrars are empowered to issue certificates of registry of trades unions, and such certificates are “conclusive evidence that the regulations of the Act with respect to registry have been complied with.”⁴ § 1456B

§ 1636. Under “The Ecclesiastical Dilapidations Act, 1871,” § 1456C an official surveyor is appointed for each diocese, by whose direction repairs are from time to time executed. As the works are finished the surveyor grants a certificate of their completion, one copy of which is filed in the registry of the diocese; and such certificate is rendered by the statute “conclusive evidence of the due execution of the prescribed works.”⁵

§ 1637. Under most of the Consolidation Acts passed in the session of 1847, two justices are empowered to correct any omission, mis-statement, or wrong description, respecting any lands, or the § 1457

¹ 38 & 39 V., c. 60, § 13, subs. 4, and Sch. iv.

² 39 & 40 V., c. 45, § 7, subs. 7, 10,

³ 37 & 38 V., c. 42, § 20; 40 & 41 V., c. 63, § 6, and Sched. of Forms.

⁴ 34 & 35 V., c. 31, § 13, subs. 5.

⁵ 34 & 35 V., c. 43, §§ 27 46, 50.

owners, lessees, or occupiers thereof, which shall be contained in the special Act, or in the schedule thereto, or in the plans or books of reference relating to the respective undertakings governed by these Acts, provided it shall appear to such justices that the error arose from mistake; and the correction shall be embodied in a certificate which shall state the particulars of the error, and shall, along with the other documents to which it relates, be deposited with the Clerk of the Peace for the county where the lands are situate; and thereupon the undertakers may take the lands or make the works in accordance with such certificate.¹ Several of these Acts further provide, that copies of the plans and books of reference, and of the corrections or extracts therefrom, certified by the Clerk of the Peace in whose custody the documents are, shall be received in all courts of justice and elsewhere, as evidence of their contents.² Under the Markets and Fairs Clauses Acts, two justices are also empowered to grant certificates, which shall be conclusive evidence that the works are completed and fit for public use;³ and the Harbours, Docks, and Piers Clauses Act contains a similar enactment, except only that the certificate must be under the hand of the chairman of Quarter Sessions.⁴ Again, certificates granted by the Board of Trade to railway companies, either under "The Railway Companies' Powers Act, 1864," or "The Railway Construction Facilities Act, 1864," must be judicially noticed, and are provable by copies published in the London, or Edinburgh, or Dublin Gazette.⁵ Moreover, certificates, authorising railway companies to modify the construction of roads, bridges, and other engineering works, which formerly were granted by the Board of Trade, which next emanated from the Commissioners of Railways, and which now again issue from the Board of Trade, will be ad-

¹ See the Markets and Fairs Clauses Act, 1847, 10 & 11 V., c. 14, § 7; The Waterworks Clauses Act, 1847, 10 & 11 V., c. 17, § 7; The Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 V., c. 27, § 7; The Towns Improvement Clauses Act, 1847, 10 & 11 V., c. 34, § 20, The Cemeteries Clauses Act, 1847, 10 & 11 V., c. 65, § 7. See also, 10 & 11 V., c. 24, § 5.

² See 10 & 11 V., c. 14, § 8; id. c. 17, § 10; id. c. 27, § 10; id. c. 65, § 8.

³ 10 & 11 V., c. 14, § 32.

⁴ 10 & 11 V., c. 27, § 26.

⁵ 27 & 28 V., c. 120, §§ 18, 30; 27 & 28 V., c. 121, §§ 20, 60. See 33 & 34 V., c. 19.

mitted in evidence;—the first, if they purport to have been made by, or by the authority of, the Board of Trade, and to be signed by some officer appointed for that purpose by the board;¹—the second, if they purport to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of the commissioners;²—and the last, if they purport to be signed by one of the secretaries or assistant secretaries of the board, or by any other officer appointed by the board to sign documents relating to railways.³

§ 1638. The registration of medical practitioners under the Medical Act of 1858 may be proved by a copy of the “Medical Register” for the time being, purporting to be printed and published by or at the instance of the Registrar of the General Council of Medical Education and Registration of the United Kingdom, under the direction of such council, or, “in the case of any person whose name does not appear in such copy,” by, “a certified copy under the hand of the Registrar of the General Council, or of any branch council, of the entry of the name of such person on the general or local register.”⁴ The registration of dentists is provable, under the Dentist’s Act, 1878,⁵ in a similar manner. Again, the registration of “pharmaceutical chemists and of chemists and druggists” is provable by printed copies of the registers purporting to be published by the registrar appointed under the Pharmacy Acts of 1852 or 1868, and countersigned by the president or two members of the Council of the Pharmaceutical Society.⁶ And here also “the absence of the name of any person from such printed register” is, in most cases,⁷ evidence, till the contrary is made to appear, that such person is not duly registered.⁸ Similar provi-

¹ 8 & 9 V., c. 20, §§ 66, 67.

² *Id.*, coupled with 9 & 10 V., c. 105, §§ 2, 4.

³ 14 & 15 V., c. 64, § 3.

⁴ 21 & 22 V., c. 90, § 27. This § further enacts, that “the absence of the name of any person from the printed copy of the medical register shall be evidence, until the contrary be made to appear, that such person is not registered according to the provisions of this Act.”

⁵ 41 & 42 V., c. 33, § 29. See, also, § 11.

⁶ 15 & 16 V., c. 56, § 7; 31 & 32 V., c. 121, § 13. The same law prevails in Ireland. See 38 & 39 V., c. 57, § 27, *Ir.*

⁷ But see 32 & 33 V., c. 117, § 1.

⁸ 31 & 32 V., c. 121, § 13. See, also, 38 & 39 V., c. 57, § 27, *Ir.*

sions with respect to the proof and admissibility of the printed copies of the register of Veterinary Surgeons are contained in the Veterinary Surgeons Act, 1881.¹

§ 1638A. Under the Army Act, 1881, “an army list or gazette purporting to be published by authority, and either to be printed by a Government printer, or to be issued, if in the United Kingdom, by Her Majesty’s Stationery Office, and if in India, by some officer under the Governor-General of India, or the Governor of any Presidency in India, shall be evidence of the status and rank of the officers therein mentioned, and of any appointment held by such officers, and of the corps, or battalion, or arm, or branch, of the service to which such officers belong.”²

§ 1639. The certificates authorising solicitors to practise must § 1458A now follow the form given by the Solicitors Act, 1877,³ and must be signed by the secretary of the Incorporated Law Society. The annual stamp duties must also be denoted thereon, and the date of the payment of such duties must be certified by the proper officer of the Inland Revenue Office, “by writing under his hand, or by other sufficient means.” They will then “be deemed the proper stamped certificates required by law to be taken out” by solicitors;⁴ and will, it is presumed, be admissible in evidence without further proof.⁵ The Law List, which purports to be published by the authority of the Commissioners of Inland Revenue, is also made, by the Act of 23 & 24 V., c. 127, *prima facie* evidence in all courts, and before all justices and others, that the persons named therein as solicitors, or conveyancers, are duly certificated; and the absence of the name of any person from such list is evidence, until the contrary be made to appear,⁶ that such person is not qualified to practise for the current year.⁷ An extract from the roll of solicitors

¹ 44 & 45 V., c. 62, § 3, subs. 2, and § 9.

² 44 & 45 V., c. 58, § 163, subs. (d).

³ 40 & 41 V., c. 25, § 16, Sch. I., Form A.

⁴ 23 & 24 V., c. 127, § 18.

⁵ See, also, 29 & 30 V., c. 84, §§ 28, 32, and Sch. II. of Act, Form A., Ir.

⁶ *R. v. Wenham*, 10 Cox, 222.

⁷ 23 & 24 V., c. 127, § 22.

kept by the registrar,¹ certified under the hand of the secretary of the Incorporated Law Society, is also evidence of the facts appearing in such extract.²

§ 1640. *Certificates* of fitness for employment, which, “under the Factory and Workshop Act, 1878,” are granted by the “surgeon for the district,” will probably be regarded as *prima facie* evidence of the age of the person named therein, and will, also, it seems, be received in evidence without proof, provided they purport to be duly signed by the person granting them;³ and, whether the law be so or not, it is clear that a written declaration by the certifying surgeon “that he has personally examined a person employed in a factory or workshop in his district, and believes him to be under the age set forth in the declaration, shall be admissible in evidence of the age of that person.”⁴ Under “The Contagious Diseases, Animals, Act, 1869,” “the certificate of an inspector of a local authority to the effect that an animal within the district is affected with cattle plague, pleuro-pneumonia, or sheep-pox, shall, for the purposes of that Act, be *conclusive* evidence in all courts of justice and elsewhere of the matter certified.”⁵ Again, certificates given by analysts under the Act of 1875 for preventing the adulteration of articles of food, drink, and drugs, are admissible in evidence if they purport to be signed by the persons giving them, and are *prima facie* proof of the result of the analysis, unless the party against whom they are tendered in evidence shall require that the analyst shall be called as a witness.⁶ § 1459

§ 1641. Under “The Chimney Sweeper’s Act, 1875,” the chief officers of police are directed to keep registers of master sweeps; and every such register is presumed to be in conformity with the directions of the Secretary of State until the contrary is shown, and

¹ See 36 & 37 V., c. 66, § 87; 38 & 39 V., c. 77, § 14; 40 & 41 V., c. 57, § 78, Ir.

² 23 & 24 V., c. 127, § 22.

³ 41 V., c. 16, §§ 27–30. See, however, 21 & 22 V., c. 90, § 37, which enacts, that no medical or surgical certificate “shall be valid, unless the person signing the same be registered under this Act.”

⁴ 41 V., c. 16, § 92.

⁵ 32 & 33 V., c. 70, § 33.

⁶ 38 & 39 V., c. 63, § 21.

any entry in it may be proved by a copy purporting to be certified as true by the chief officer.¹ Any statement, also, purporting to be signed by him, "of the absence of such an entry in any case" is made "evidence of the matters therein appearing."²

§ 1642. Under the statutes relating to *marriages*, if any action § 1459A be brought, as it may be, against a party for having *vexatiously entered a caveat*, "a copy of the declaration of the Registrar-General, purporting to be sealed with the seal of the General Register Office, shall be evidence that the Registrar-General has declared such caveat to have been entered on frivolous grounds, and that they ought not to obstruct the grant of the licence, or the issue of the certificate;" and the plaintiff thereupon shall recover costs and damages.³

§ 1643. The registrar of judgments in Ireland is required, by an § 1460 Act passed in 1850, to grant a certificate under his hand of the registry or re-entry of any judgment, or revival, decree, rule, order, Crown bond, recognizance or *lis pendens*, or of any satisfaction, vacate, or quietus, in his office, and this certificate is made evidence of such registry or re-entry.⁴

§ 1644. The Transfer of Land Act of 1862,⁵—which established a § 1460A registry of title to landed estates,⁶—directed the registrar, upon request, to deliver to every registered proprietor a certificate, called a "land certificate," which was to be under the seal of the office, and signed by the registrar; and such certificate, which was required to contain "all such particulars as are material or useful for the purpose of manifesting the exact nature of the owner's estate and interest,"⁷ was made evidence (whether conclusive or merely *prima facie* was not specified) of the several matters therein contained.⁸ § 70 of the same Act empowered the registrar, under particular

¹ 38 & 39 V., c. 70, § 14.

² *Id.*

³ 7 W. 4 & 1 V., c. 22, § 5; 6 & 7 W. 4, c. 85, § 37; 7 & 8 V., c. 81, § 43, Ir.

⁴ 13 & 14 V., c. 74, § 10, Ir.

⁵ 25 & 26 V., c. 53.

⁶ § 2.

⁷ § 68.

⁸ § 71.

circumstances, to grant "special land certificates," which "shall be *conclusive* evidence of the title of the registered proprietor to the land, as appearing by the record of title." As this Statute,—like too many others,—was not productive of all the beneficial results anticipated by its sanguine promoters, a fresh attempt was made by the Legislature in 1865 to simplify titles and facilitate the transfer of land. By the Act passed for these laudable purposes a new land registry has been established,¹ and the registrar is empowered to grant land certificates, whether the title be absolute, qualified, or possessory,² copies of registered leases,³ and certificates of charge.⁴ Both these classes of certificates are rendered "*prima facie* evidence of the several matters therein contained," while the office copy of a registered lease is made "evidence of the contents of the lease."⁵ Under The Declaration of Title Act, 1862," the Chancery Division is authorised, after making a declaration of title in favour of any landowner, to grant him a certificate, under seal, setting forth the title so declared, and further stating that the time for appealing has expired; and such certificate is *conclusive* evidence of the facts therein stated.⁶ In "The Record of Title Act, Ireland, 1865," will be found clauses very similar to those contained in the first and third of the English Acts just mentioned.⁷

§ 1645. Under the recent Act⁸ authorising the *registration of deeds*, conveyances, wills, incumbrances, and other matters affecting lands in Yorkshire, the registrar, or his deputy, is bound to indorse on each instrument registered a certificate stating the date of registration, and the volume, page, and number in the register in which it is enrolled; this certificate must then be signed by the registrar and sealed with the office seal, after which it becomes evidence,⁹ the signature and seal being judicially noticed.¹⁰ The

¹ 38 & 39 V., c. 87, § 5. ² § 10. ³ § 16. ⁴ § 22. ⁵ § 80.

⁶ 25 & 26 V., c. 67, § 22. See, also, 28 & 29 V., c. 88, § 9, Ir.

⁷ 28 & 29 V., c. 88, §§ 9, 18, 20, 21, Ir. See, also, §§ 16 and 32, as to the effect of certain memorials, when registered under the Act.

⁸ 47 & 48 V., c. 54. This Act, which is entitled "The Yorkshire Registries Act, 1884," repeals the old statutes relating to registration in Yorkshire, cited ante, § 1127, and establishes three register offices at Northallerton, Beverly, and Wakefield, § 31.

⁹ § 9.

¹⁰ § 32.

registrar must also, at the instance of any person, cause an official search to be made in the office books, and furnish a certificate of the result under his hand and the office seal; and every certificate so signed and sealed, shall be receivable in evidence.¹ The Act of Queen Anne's reign, which authorises the registration of legal instruments in the Middlesex Registry Office,² contains somewhat similar enactments respecting certificates of enrolment,³ and of searches;⁴ but these certificates,—unlike those in Yorkshire,—require no official seal, though, oddly enough, the certificates of searches, as well as those which relate to “judgments, statutes, or recognizances,” must be “testified by two credible witnesses.”⁵

§ 1646. Where deeds, memorials, or other instruments are re- § 1462
quired by statute to be enrolled or registered, the mode of proving the enrolment or registration will depend in great measure on the language employed in the particular Act; but, perhaps, thus much may be laid down as a general rule, that where, in pursuance of the uniform practice of the office of enrolment or registration, the officer, at the time of making the proper entry in his books, returns to the party the original instrument, with a certificate or memorandum of enrolment or registration indorsed thereon, such certificate or memorandum will be evidence both of the fact and date of enrolment or registration, without proving the signature or official character of the person signing it.⁶ This doctrine has long since been applied to the enrolment of bargains and sales under the Act of 27 H. 8, c. 16;⁷ of leases of lands within the

¹ §§ 20, 21.

² 7 A. c. 20.

³ §§ 6, 19.

⁴ § 12.

⁵ Quere, whether either of these witnesses must now be called, or the registrar's signature proved in any way. See 8 & 9 V., c. 113, § 1, cited ante, § 7.

⁶ *Doe v. Lloyd*, 1 M. & Gr. 684, 685. There a deed, requiring enrolment under the Mortmain Act, was produced at the trial, and bore the following indorsement.—“Enrolled in the High Court of Chancery the 17th of December, 1836, being first duly stamped, according to the tenor of the statutes made for that purpose. D. Drew.” The court held that, without proving the signature or official character of Mr. Drew, the memorandum was evidence that the deed was enrolled on the day stated, it having been *certified to by the court* by an officer of the Enrolment Office, that the memorandum was in the usual form. See ante, § 21.

⁷ *Kinnersley v. Orpe*, 1 Doug. 58, per Buller, J.; recognised in *Doe v. Lloyd*, 1 M. & Gr. 685; *Compton v. Chandless*, 4 Esp. 16, per Ld. Kenyon.

Duchy of Lancaster;¹ and of indentures under the Mortmain Act;² and it is equally applicable to the enrolment of all instruments which are now necessarily enrolled in the respective offices of the Duchies of Cornwall or Lancaster,³ and also to a variety of other enrolments which are rendered necessary by Act of Parliament.

§ 1647. Indeed, the same doctrine has been recognised and even § 1463 extended by the Legislature with respect to all documents enrolled either in the *Petty Bag Office*,⁴ or in what is now called the *Enrolment Department of the Central Office*;⁵ for the Act of 12 & 13 V., c. 109, enacts, in § 12, that “the clerk of the petty bag shall, upon request, and payment of the proper fees payable in respect thereof, indorse or write upon every specification which at any time heretofore has been enrolled in the Petty Bag Office (provided the enrolment shall then be in his custody,) and upon every deed, instrument in writing, and document, which at any time heretofore has been, or at any time hereafter shall be, enrolled in the Petty Bag Office, a certificate stating that such specification, deed, instrument in writing, or document has been or was enrolled in the said Petty Bag Office, and the day of such enrolment, and shall cause such certificate to be sealed or stamped with the said Chancery Common Law Seal; and every such certificate purporting or appearing to be so sealed or stamped, shall be admitted and received in evidence, as well before either House of Parliament, as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, and other persons whomsoever, without further proof, and as sufficient *prima facie* evidence that the specification, deed, instrument in writing, or document, therein mentioned was duly enrolled in the Petty Bag Office on the day mentioned in such certificate.” § 18 of the same statute con-

¹ *Kinnersley v. Orpe*, 1 Doug. 56.

² *Doe v. Lloyd*, 1 M. & Gr. 671; 1 Scott, N. R. 505, S. C.; 9 G. 2, c. 36.

³ See 26 & 27 V., c. 49, §§ 31, 32; 7 & 8 V., c. 65, §§ 31, 33; and 11 & 12 V., c. 83, § 14.

⁴ This office will be abolished on next vacancy of the clerk, 42 & 43 V., c. 78, 1st Sch., Part 2.

⁵ Rules of Sup. Ct., 1883, Ord. LXI., R. 1.

tains a similar enactment, authorizing the clerk of the Enrolment Department, or his deputy or assistant, to certify the due enrolment of all documents deposited in that office.¹

§ 1648. With respect to all deeds relating to the possessions § 1464 of the Crown, which are enrolled in the *Land Revenue Office*, it is now enacted by statute, that a memorandum of enrolment on the deed, purporting to be signed by the keeper of the records and enrolments, or his deputy or assistant, shall be receivable as sufficient evidence, not only for the enrolment but even of the due execution of the deed, and that, too, without proof of the signature attached to it.²

¹ The precise words of § 18, which, from some unaccountable reason, vary from those employed in § 12, are as follows:—"The Clerk of the said Enrolment Office, or his deputy or assistant, shall, upon request, and payment of the proper fees payable in respect thereof, indorse or write upon every deed, specification instrument in writing, and document, which at any time heretofore has been, or at any time hereafter shall be, enrolled in the said Enrolment Office, a certificate that such deed, specification, instrument in writing, or document, has been or was enrolled in Chancery, and the day on which such enrolment was made, and shall cause such certificate to be sealed or stamped with the said seal of the Chancery Enrolment Office (*a*); and every such certificate purporting or appearing to be sealed or stamped shall be admitted and received in evidence by all courts and other tribunals, judges, justices, and others, without further proof, and as sufficient *prima facie* evidence that the deed, specification, document, or instrument in writing, therein mentioned was duly enrolled in the Court of Chancery on the day and at the time mentioned in such certificate."

² 2 W. 4, c. 1, § 26, enacts, that "where any deed or certificate, receipt, or other instrument, which shall appear to have been made, given, or executed under the authority of this Act, or of any Act heretofore passed relating to the possessions of land revenues of the Crown, shall have written thereon a memorandum of its having been enrolled in the said office of records and enrolments, and such memorandum shall purport to be signed by the Keeper of the Records and Enrolments, or by any person acting as his deputy or assistant, such memorandum shall, in the absence of evidence to the contrary, be sufficient proof of the deed, certificate, receipt, or other instrument, having been duly made, granted, given, or executed by the party or parties by whom the same shall purport to have been signed or executed, and of its having been duly enrolled as stated by such memorandum, and of the provisions of the Act, under which the same shall appear to have been made, granted, given, or executed, having been duly complied with; and such memorandum shall be receivable in evidence without proof of the handwriting of the signature thereto." See 16 & 17 V., c. 56, § 6.

(*a*) This seal must be judicially noticed. See *ante*, § 6.

§ 1648A. Under the Bills of Sale Acts, 1878, 1882,¹ the certificate of registration of a bill of sale in the Bills of Sale Department of the Central Office,² even though it state that the affidavit of execution has been duly filed as required by those statutes, is not sufficient evidence of the bill of sale but an authenticated or office copy of the document registered, must, in strict law, be actually produced.³

§ 1649. Besides the mode of proving enrolments which has just been stated, it is clear that they may now be proved in most, if not in all, cases by the production of *office copies*; and by several Acts of Parliament such copies are made evidence, not only of the enrolment itself, but of the *contents of the instruments enrolled*. One of these statutes, The Charitable Trusts Act of 1855, has already been referred to in another connexion;⁴ and another Act is that, just cited,⁵ of 12 & 13 V., c. 109, which enacts, in § 17, that “every document or writing sealed or stamped, or purporting or appearing to be sealed or stamped, with the said seal of the Chancery Enrolment Office, and purporting to be a *copy* of any enrolment or other record, or of any other document or writing of any description whatsoever, including any drawings, maps, or plans thereunto annexed or endorsed thereon, shall be deemed to be a true copy of such enrolment, record, document or writing, and of such drawing, map, or plan, if any, thereunto annexed, and shall without further proof, be admissible and admitted in evidence as well before either House of Parliament, as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, officers, and other persons whomsoever, in like manner and to the same extent and effect as the original enrolment, record, document, or writing, could or might be admissible or admitted in evidence, as well as for the purpose of proving the contents of such enrolment, record, document, or writing, and the drawing, map, or

§ 1465

¹ 41 & 42 V., c. 31, § 10; 45 & 46 V., c. 43, § 8.

² Rules of Sup. Ct., 1883, Ord. LXI., R. 1.

³ See *Halkett v. Emmott*, 47 L. J., Q. B. 436; S. C. nom. *Emmott v. Marchant*, *Halkett*, Claim., L. R., 3 Q. B. D. 555; *Mason v. Wood*, 45 L. J., C. P. 76; Law Rep., 1 C. P. D. 63, S. C.

⁴ 18 & 19 V., c. 124, § 42, cited ante, § 1127, n. 4.

⁵ Ante, § 1647.

plan, if any, thereunto annexed, as also proving such enrolment, record, document, or writing, to be an enrolment, record, document, or writing, of or belonging to the said Court of Chancery, and that such enrolment, record, document, or writing, was made, acknowledged, prepared, filed, or entered, on the day, and at the time, when the original enrolment, record, document, or writing shall purport to have been made, acknowledged, prepared, filed or entered."

§ 1650. Another salutary example of this mode of proof is § 1466 afforded by the Act of 11 & 12 V., c. 83, which relates, among other things, to the mode of proving documents enrolled in the respective Duchies of Cornwall and Lancaster. That Act, by § 6, enacts, that "where any deed, certificate, receipt, or other instrument relating to the lands or possessions of the Duchy of Cornwall, shall have been duly enrolled in the office of the said Duchy, the enrolment in the books of the said office, or an examined copy of such enrolment, or a certificate purporting to set forth a true copy of the whole or part thereof, and purporting to be signed and certified by the Keeper of the Records of the Duchy for the time being, shall, in the absence of evidence to the contrary, and without producing the original, or calling any attesting witness, and (in the case of a certified copy) without proof, other than the production of such certificate, that such certified copy is in fact a true copy, be admitted by and before all courts and justices, and in all legal proceedings, to be proof of such original instrument or enrolment thereof, or of so much thereof as the said certified copy purports to set forth, and that the original was duly made, granted, given, or executed by the parties thereto." § 14 of the same Act extends the provisions just set out to all instruments enrolled in the Duchy of Lancaster since the 31st of August, 1848.

§ 1650A. "The Yorkshire Registries Act, 1884,"¹ contains, in addition to the sections already referred to at p. 1402, some special provisions which deserve notice. First comes § 22, which, after

¹ 47 & 48 V., c. 54.

authorising *any person*,—subject to the provisions of the Act, and to any rules made thereunder,—to require a certified copy of, or extract from, any document enrolled in the register, or of or from any entry in the register, or any book or index kept at the office, or any rule made under the Act, proceeds to enact that “thereupon a certified copy or extract, signed by the registrar and sealed with the seal of the register office, shall be given to such person; and every such copy or extract, so signed and sealed, shall be receivable as evidence of the contents of such document or entry, in every case where such contents may under the rules of evidence be proved by means of any copy or extract; but nothing in this section contained shall be taken to dispense with the production of any original document, in any case in which the production thereof might otherwise be required, nor dispense with any proof, which might otherwise be required, as to the due making and execution thereof.” § 44 gives directions that “all registers, books, indexes, and other documents and instruments in or belonging” to the old registries abolished by this Act, shall “be vested in the Clerks of the Peace” for the respective ridings, and be held by them for the purposes of the New Registry, and be disposed of as the Justices at Quarter Sessions may direct; and it then further enacts, that such Justices shall provide for the deposit and safe custody of all these documents in the new registry offices, and for the making of searches therein and of copies thereof. By virtue of § 45, all copies of enrolments of bargains and sales enrolled in the old registries, and of the entries or enrolments of deeds, wills, writings, or conveyances registered at full length in the old registry for the North Riding, shall be signed by the registrar and sealed with the seal of the office; and all copies so signed and sealed shall be as good evidence as attested copies under the old law.¹

§ 1651. Again, under the Act of 2 & 3 W. 4, c. 87, which is § 1467 one of the statutes regulating the office at Dublin for the registration of deeds, conveyances, and wills in Ireland, office copies of the

¹ The old statutes, now repealed by this new Act, required the copies to be attested by “two credible witnesses.” See ante, § 1645, *ad fin.*; also 5 A., c. 18, § 2; 6 A., c. 35, § 17; and 8 Geo. 2, c. 6, § 21.

memorials registered are rendered admissible in evidence under certain restrictions; for § 32 of that statute enacts, that “in all proceedings before any court of justice, for all purposes whatsoever, an office copy of any memorial registered in the said office shall, upon such office copy being proved in like manner as an office copy of any other record, be received and taken as evidence of the contents of the memorial of which it purports to be an office copy, without the production of the original memorial: provided always, that the party producing such office copy shall, if out of Dublin ten days, and if in Dublin eight days, before producing the same, give notice in writing to the adverse party thereof; and provided also, that such adverse party shall not within four days after receiving such notice, demand by a counter notice that the original memorial shall be produced; and in every case in which such counter notice shall be given, the costs of producing the original memorial shall be paid by either party, as the court in which the proceeding shall take place, or the taxing officer of such court, may determine.”

§ 1651A. The Act, too, passed in 1850, for amending the laws for the registration of assurances of lands in Ireland,¹ further enacts in § 47, that “the registrar shall cause to be provided for any person applying for the same, copies or extracts from any document which has been deposited in the said Register Office under this Act; and in every case when a copy or extract is so provided, the seal of the said Register Office shall be impressed on each sheet of such copy or extract; and a certificate, signed by the proper officer of the said Register Office, shall be written at the head, or in the margin of such copy or extract, or shall be indorsed on the same, which certificate shall contain a statement that the copy or extract on which the same is written in an examined copy of, or extract from, a document deposited in the said Register Office, and shall specify the book or parcel in which such document is made up, and the number of such document in such book or parcel; and every document so sealed, with such certificate thereon, containing such statement, and purporting to be so signed

¹ 13 & 14 V., c. 72, Ir.
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as aforesaid, shall be evidence that such document is a copy or extract from a document deposited in the said Register Office, and made up in the book or parcel specified in such certificate, and numbered in such book or parcel as in such certificate is expressed, and of the contents of the document deposited in the said Register Office, or of such part thereof as is purported to be extracted." An assignment of a judgment in Ireland may be proved by an examined copy of the enrolment of the memorial,¹ and a certified copy of such enrolment would probably be also admissible.²

§ 1652. To prove a judgment mortgage under the Irish Act § 1467A of 13 & 14 V., c. 29, §§ 6 & 7, the chain of evidence consists of three links: First, the judgment must be proved in the usual way; next the affidavit, which is filed in the court when the judgment is entered, must be proved by an office, or a certified, or an examined copy; and, lastly, the due registration of an office copy of this affidavit in the office for registering deeds and wills in Ireland, must be proved either by an examined or by a certified copy.³ It seems, too, to be still a question of doubt whether such last-named copy will be received in evidence, unless the notice required by the Act, just cited, of 2 & 3 W. 4, c. 87, § 32, has been duly given.⁴

§ 1653. To render a parson's deed of relinquishment available § 1467B under the Clerical Disabilities Act, 1870,⁵ first, the deed must be enrolled in the Enrolment Department of the Central Office,⁶ and next, an office copy of it must be recorded by the bishop. The statute then provides, in § 7, that "a copy of the record in the registry of the diocese, duly extracted and certified by the registrar of the bishop, shall be evidence of the due execution, enrolment, and recording of the deed, and of the fulfilment of all the requirements of the Act in relation thereto."

¹ *Fitzgerald v. Fitzgerald*, 8 Com. B. 592; *Hobhouse v. Hamilton*, 1 Sch. & Lef. 207; 9 G. 2, c. 5, Ir.; 25 G. 2, c. 14, Ir.; 12 G. 3, c. 19, § 3, Ir.

² See ante, § 1599.

³ See *Duncan v. Brady*, 12 Ir. Law R., N. S. 171; 13 & 14 V., c. 72, § 9.

⁴ *Id.*

⁵ 33 & 34 V., c. 91.

⁶ Rules of Sup. Ct., 1883, Ord. LXI., RR. 1, 9.

§ 1655. The mode of proving *by-laws*¹ varies according to the § 1469 particular language of the statute or charter, under the authority of which they have been made. For instance, the Companies Clauses Consolidation Act empowers every company to which that Act applies, to make by-laws for the purpose of regulating the conduct of their officers and servants, and of providing for the due management of their affairs;² and the production of a written or printed copy *purporting* to have the *seal of the company affixed* thereto, “shall be sufficient evidence of such by-laws in all cases of prosecution under the same.”³

§ 1656. With respect to such by-laws as any *railway company* § 1470 is empowered to make for regulating the traveling upon, or using and working, the railway, or for imposing penalties upon *persons other than the servants*, it would seem that, before they can be enforced, the company must produce either the book containing the originals purporting to be under its seal, or an examined or certified copy of the by-laws,⁴ and must also, perhaps, show that a certified copy has been sent to the Board of Trade,—or, from the

¹ As to when by-laws will be inferred from long usage, see ante, § 127.

² 8 & 9 V., c. 16, § 124, enacts, that “it shall be lawful for the company from time to time to make such by-laws as they think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such by-laws, and make others, provided such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act; and such by-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and a copy of such by-laws shall be given to every officer and servant of the company affected thereby.” § 125 enacts, that “it shall be lawful for the company; by such by-laws, to impose such reasonable penalties upon all persons, being officers or servants of the company, offending against such by-laws, as the company shall think fit, not exceeding five pounds for any one offence.” § 126 enacts, that “all by-laws to be made by the company shall be so framed as to allow the justice, before whom any penalty imposed thereby may be sought to be recovered, to order a part only of such penalty to be paid, if such justice shall think fit.”

³ § 127; 8 & 9 V., c. 113, § 1, cited ante, § 7; qu. whether the same proof would suffice, if the by-laws were offered in evidence by the company, in defending an action for false imprisonment.

⁴ *Motteram v. E. Cos. Ry. Co.*, 29 L. J., M. C. 57; 7 Com. B., N. S. 58, S. C.; cited ante, § 1600.

9th of November, 1846,¹ until the 10th of October, 1851,² to the old Commissioners of Railways,—and has been allowed, or at least, not disallowed, by these respective bodies;³ and further, that the by-laws have been duly published. Much difficulty has been felt in determining what will amount to proof of due publication. The late Mr. Justice Williams, unable to explain away the precise language of the Legislature, was of opinion that nothing less would suffice than proof, either direct, or at least presumptive, that a printed paper or painted board, containing a copy, was affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature of the respective by-laws, and in case of its being afterwards displaced or damaged, then, that such paper or board was replaced as soon as conveniently might be.⁴ The other judges of the Common Pleas, being less scrupulous than their learned brother, have rather cut than untied the statutable knot by deciding, that, upon an information before justices charging a railway passenger with an infraction of the company's by-laws, it was sufficient to prove that copies of the by-laws were affixed at the two stations respectively at which the passenger entered and quitted the carriage.⁵ In many of the earlier Railway Acts a clause was introduced, which rendered it necessary to obtain the sanction of certain justices or other persons to the by laws made by the company, but the Act of 3 & 4 V., c. 97, enacts, in § 10,⁶ that “so much of every clause, provision, and enactment in any Act of Parliament herebefore passed, as may require the approval or concurrence of any justice of the peace, court of Quarter Sessions, or other person or persons, other than members of the said companies, to give validity to any by-laws, orders, rules, or regulations made by any such company, shall be repealed.”

¹ 9 & 10 V., c. 105, § 2; Gazette of Friday, 6th Nov. 1846.

² When the Act appointing Commiss. of Rail. was repealed. See 14 & 15 V., c. 64, § 1.

³ Compare 3 & 4 V., c. 97, §§ 7—9, and 8 & 9 V., c. 20, §§ 108—111. As to proof of the order of the Board of Trade, allowing the by-laws, see ante, pp. 1308 and 1361, n. 2; and, as to proof of a similar order by Commiss. of Rail., see ante, pp. 1360, n. 4, and 1361, n. 1.

⁴ 8 & 9 V., c. 20, §§ 110, 111.

⁵ *Motteram v. E. Cos. Ry. Co.*, 7 Com. B., N. S. 58; 29 L. J., M. C. 57, S. C.

⁶ Though this § was repealed by 34 & 35 V., c. 78, the repeal did not affect the law as stated in the text, see § 17 of the Repealing Act.

§ 1657. The by-laws made by the Corporation of London in pursuance of certain Acts¹ for regulating the port of London and the vend and delivery of coals, may be proved by the production of a printed or written copy purporting to be signed by the *town clerk* of the city of London; and such copy "shall, without any other proof, be admitted as evidence of such by-laws, and of the making, submission, allowance, and publication thereof, unless the contrary shall be proved."² So, any by-law or order made by the local authority under "the Slaughter Houses, &c. Metropol. Act, 1874," may be proved by a printed copy purporting to be certified by the clerk of the local authority to be a true copy, or purporting to be sealed by the seal of the local authority; and any such by-law or order shall, until the contrary is proved, be deemed to have been duly made and confirmed.³ So, the production of a printed copy of the by-laws made by the Metropolitan Board of Works, or by a district board, or vestry, under the Metropolis Local Management Act of 1855, "if authenticated by the seal of the board or vestry, shall be evidence of the existence, and of the due making, confirmation, and publication of such by-laws, in all prosecutions under the same, without adducing proof of such seal, or of the fact of such confirmation or publication of such by-laws."⁴ So, any by-law made by the Municipal Corporation of Dublin may be proved by a copy under the corporate seal, provided it contain a declaration signed by the Lord Mayor that the by-law has been duly made, published, and allowed, and is still in force.⁵ § 1471.

§ 1658. By-laws made in Ireland under the Common Lodging Houses Acts,⁶—unlike those made with respect to lodging houses under the Public Health, Ireland, Act, 1878,⁷—are provable by copies signed or sealed by the proper local authority, and countersigned by some person or persons duly representing the Local

¹ 10 G. 4, c. exxiv.; 1 & 2 W. 4, c. lxxvi.; 1 & 2 V., c. ci.; 8 & 9 V., c. 101.

² 8 & 9 V., c. 101, §§ 6, 7; and 8 & 9 V., c. 113, § 1, cited ante, § 7.

³ 37 & 38 V., c. 67, § 8.

⁴ 18 & 19 V., c. 120, § 203.

⁵ 12 & 13 V., c. 97, § 20, Ir.

⁶ 29 & 30 V., c. 44, §§ 21, 23, Ir.; 35 & 36 V., c. 69, §§ 2, 5, Ir.

⁷ 41 & 42 V., c. 52, §§ 91, 100. As to proof of these by-laws, see post, § 1659, ad fin.

Government Board.¹ So, the special rules which are established in any coal mine, or metalliferous mine, under the Acts of 35 & 36 V., cc. 76 & 77, may be proved by a copy certified under the hand of one of the Government Inspectors; and such copy is also evidence that the rules have been duly established.² Again, a printed copy of the regulations made by any Metropolitan Water Company for the purpose of preventing the waste, misuse, or contamination of water, if dated, and purporting to be made as in "The Metropolis Water Act, 1871," is pointed out, and to be authenticated by the seal of such company is "conclusive evidence of the existence, and of the due making, confirmation, and publication, of such regulations in all prosecutions or proceedings under the same, without adducing proof of such seals, or of the fact of such confirmation or publication of such regulations, or of any of the requirements of the Act relative thereto having been complied with."³ The by-laws made by the conservators of the Thames, since the commencement of the year 1865, are provable by copies purporting to be printed by direction of the conservators, and authenticated by the common seal, and by the signature of their secretary; and every such copy is conclusive evidence of such by-law, and of the due making and allowance thereof, without proof of such seal or signature.⁴ Somewhat similar provisions are also to be found in the Salmon Fisheries Act, 1873, for facilitating the proof of by-laws made by any Board of Conservators for a fishery district.⁵ It is worthy of notice that "The Explosive Act, 1875,"⁶ though it contains several elaborate provisions for the making and publication of by-laws with respect to the loading and conveyance of gunpowder,⁷ has no clause to regulate or simplify the mode of proving such rules. The rules and by-laws made by trustees of docks, under the Passengers Act, 1855, for regulating the embarkation and landing of emigrants, and for licensing emigrant

¹ These would seem to be either the Under Secretary to the Lord Lieutenant, or the president or vice-president of the Board, or any two other members of the Board, "both executing." See 35 & 36 V., c. 69, § 4, Ir.

² See 35 & 36 V., c. 76, § 59, and c. 77, § 30; 27 & 28 V., c. 48, § 5.

³ 34 & 35 V., c. 113, § 25.

⁴ 27 & 28 V., c. 113, § 33.

⁵ 36 & 37 V., c. 71, § 45.

⁶ 38 & 39 V., c. 17.

⁷ §§ 34—38, 84.

porters, are subject to a peculiar mode of proof; for their validity depends on the approval of a Secretary of State, who must authorise their publication in the "London Gazette," "which publication shall for all purposes be deemed conclusive evidence of such rules and by-laws, and of the approval thereof by such Secretary of State."¹

§ 1659. Under "The Municipal Corporations Act, 1882," "the production of a written copy of a by-law, made by the *council* under that Act, or under any former or present or future general or local Act of Parliament, if authenticated by the corporate seal, shall, until the contrary is proved, be sufficient evidence of the due making and existence of the by-law, and, if it is so stated in the copy, of the by-law having been approved and confirmed by the authority, whose approval or confirmation is required to the making or before the enforcing of the by-law."² Again, by-laws made, under the Public Health Act, 1875,³ by any Local Authority other than the council of a borough,—whether they relate to scavenging and cleansing,⁴ or to the keeping of animals,⁵ or to common lodging houses,⁶ or to offensive trades,⁷ or to mortuaries,⁸ or to new buildings,⁹ or to public pleasure grounds,¹⁰ or to markets,¹¹ or to slaughter houses,¹² or to the licensing of horses, boats, &c., for hire,¹³ or to hop pickers,¹⁴—are provable by copies signed and certified by the clerk of such authority to be true copies, and to have been duly con-

¹ 18 & 19 V., c. 119, § 82.

² 45 & 46 V., c. 50, § 24. As to pleading such by-laws, see *Elwood v. Bullock*, 6 Q. B. 384—388. For other enactments respecting the making and proof of by-laws, see "The Irish Municipal Corporation Act," 3 & 4 V., c. 108, §§ 125—127; "The Markets and Fairs Clauses Act, 1847," 10 & 11 V., c. 14, §§ 42—49; "The Commissioners Clauses Act, 1847," *id.* c. 16, §§ 96—98; "The Harbours, Docks, and Piers Clauses Act, 1847," *id.* c. 27, §§ 83—90; "The Towns Improvement Clauses Act, 1847," *id.* c. 34, §§ 200—207; and "The Town Police Clauses Act, 1847," *id.* c. 89, § 71.

³ 38 & 39 V., c. 55, §§ 182—188, 326. This last sect. enacts, that all by-laws made under any of the Sanitary Acts, not inconsistent with this Act, "shall be deemed to be by-laws under this Act."

⁴ § 44.

⁵ § 44.

⁶ §§ 80, 90.

⁷ § 113.

⁸ § 141.

⁹ § 157.

¹⁰ § 164.

¹¹ § 167.

¹² § 169.

¹³ § 172.

¹⁴ § 314.

firmed; and every such copy "shall be evidence, until the contrary is proved, in all legal proceedings of the due making, confirmation,¹ and existence of such by-laws without further or other proof."² The same mode of proof is adopted in the Public Health, Ireland, Act, 1878, with respect to all by-laws made by any sanitary authority under that statute.³

§ 1660.⁴ The ADMISSIBILITY AND EFFECT OF PUBLIC DOCUMENTS, § 1473 as instruments of evidence, will next be considered. And here, following the same course which was pursued, when explaining in what manner public documents might be proved, attention will first be drawn to *Statutes, State Papers*, and other writings of a cognate character. With respect to these documents, it may be generally observed, that, provided they have been duly authenticated in some one of the modes stated above, and their contents be pertinent to the issue, they will be admissible, either as *prima facie* or as conclusive proof of the facts directly stated in them; and in many cases they will be received in evidence even of such matters as are inserted in them by way of introductory *recital*. Thus, where certain *public statutes* recited that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto.⁵ So, a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and the war will be taken notice of without proof,

¹ As to the confirmation of by-laws made under the above-named Act, see 47 V., c. 12.

² 38 & 39 V., c. 55, § 186. The same mode of proof is adopted with respect to by-laws made by any Local Authority under "The Public Parks, Scotland, Act, 1878," 41 V., c. 8, § 20.

³ 41 & 42 V., c. 52, § 223, Ir. See, also, §§ 41, 54, 91, 100, 103, 105, 129, of same Act.

⁴ Gr. Ev. § 491, in some part.

⁵ R. v. Sutton, 4 M. & Sel. 532.

whether this nation be or be not a party to it.¹ So, a recital of relationship, even in a *private* Act, has been received by the House of Lords as cogent evidence of pedigree in a peerage case; because such recitals used never to be inserted in a private Act, unless their truth had first been ascertained by the judges, to whom the bill had been referred.² As, however, the evidence in support of private bills is no longer submitted to the judges for approval, recitals inserted in them since this change in the practice would seem to be inadmissible;³ for, as a general rule, a local or private statute, though it contains a clause requiring it to be judicially noticed, is not, as against *strangers*, any evidence of the facts recited;⁴ neither does it affect the public with a knowledge of its contents.⁵ The recitals, too, in a public Act are not conclusive evidence; and, therefore, where the Schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false.⁶

§ 1661.⁷ The *Speech of the Sovereign* in opening Parliament, and the Address of either House to the Crown, would seem to be evidence, in the nature of reputation, of the public matters they recite.⁸ The *Journals*, also, of either House are the proper evidence of the action of that House upon all matters before it, whether legislative, ministerial, or in the Lords' House, judicial.⁹ The committee of privileges has even admitted an entry in their Journals as evidence of limitations in a patent of peerage, without

¹ *R. v. De Berenger*, 3 M. & Sel. 67, 69.

² *Wharton Peer.*, 12 Cl. & Fin. 302; *Shrewsbury Peer.*, 7 H. of L. Cas. 13, 14.

³ *Shrewsbury Peer.*, 7 H. of L. Cas. 13, per Ld. St. Leonards.

⁴ *Brett v. Beales*, M. & M. 421; *Taylor v. Parry*, 1 M. & Gr. 604, 619, 622; *D. of Beaufort v. Smith*, 4 Ex. R. 450, 470; *Cowell v. Chambers*, 21 Beav. 619; *Mills v. May*, of Colchester, 36 L. J., C. P. 214, per Willes, J.; *Polini v. Gray*, and *Sturla v. Freccia*, L. R., 12 Ch. D. 411, 427—437, per Ct. of App.; 49 L. J., Ch. 41, 48—53, S. C.

⁵ *Ballard v. Way*, 1 M. & W. 529, per Ld. Abinger.

⁶ *R. v. Greene*, 6 A. & E. 548.

⁷ *Gr. Ev.* § 491, slightly.

⁸ *R. v. Francklin*, 17 How. St. Tr. 636—638.

⁹ *Jones v. Randall*, 1 Cowp. 17; *Root v. King*, 7 Cowen, 613.

requiring the production of the patent.¹ So, a foreign declaration of war, transmitted by the British Ambassador to the Secretary of State's office, and produced by a clerk from that office, is sufficient evidence to prove the date of the commencement of hostilities between two foreign states.² How far *diplomatic correspondence* may go to establish the facts recited, does not clearly appear;³ but, in America, such correspondence, communicated by the President to Congress, has been held sufficient proof of the acts of foreign governments and functionaries therein narrated;⁴ and in that country this evidence would seem to be generally admissible, whenever the facts recited are not the principal points in issue, but are required to be proved, merely in order to support some introductory averment in the pleadings.⁵

§ 1662. Under "The Documentary Evidence Act, 1868," the § 1475
Government *Gazette*,—which term applies equally to the London, the Dublin, and the Edinburgh Gazettes,⁶—is, as already pointed out,⁷ *prima facie* evidence of any proclamation, order, or regulation" issued by her Majesty, or by the Privy Council, or by any of the principal departments of the government.⁸ At common law, too, the Gazette is admissible evidence of other Acts of State, such addresses received by the Crown, and the like.⁹ But in regard to the acts of public functionaries, which have no relation, or only a slight relation, to the affairs of government,—such as the appointment of an officer to a commission in the army,¹⁰ or the

¹ *Ld. Dufferin's case*, 4 Cl. & Fin. 568; *Saye & Sele Peer.*, 1 H. of L. Cas. 507, 510.

² *Thelluson v. Cosling*, 4 Esp. 266.

³ See *R. v. Francklin*, 17 How. St. Tr. 638.

⁴ *Radcliffe v. Un. Ins. Co.*, 7 Johns. 38, 51; *Talbot v. Seeman*, 1 Cranch, 1, 37, 38.

⁵ *Radcliffe v. Un. Ins. Co.*, 7 Johns. 51, per Kent, C. J.

⁶ 31 & 32 V., c. 37, § 5.

⁷ *Ante*, § 1527.

⁸ 31 & 32 V., c. 37, § 2.

⁹ *R. v. Holt*, 5 T. R. 436, 443; *Att-Gen. v. Theakstone*, 8 Price, 89; *Picton's case*, 30 How. St. Tr. 493; *Van Omeron v. Dowick*, 2 Camp. 44; *B. N. P.* 226.

¹⁰ *R. v. Gardner*, 2 Camp. 513, per *Ld. Ellenborough*; *Kirwan v. Cockburn*, 6 Esp. 233, per *id.* But see now by Statute, *ante*, § 1638A.

Queen's grant of Land to a subject,¹—the *Gazette*, unless rendered admissible by statute, cannot in general be read in evidence.

§ 1663. In some few cases, the Legislature has expressly made this paper *conclusive* evidence of certain facts, which are directed to be published in it.² For instance, the production of the Dublin Gazette, “purporting to be printed and published by the Queen's authority,” and containing any proclamation, warrant, order, or notice under the Irish Peace Preservation Act,³ is conclusive evidence of all the facts and circumstances necessary to authorise the issuing of any such instrument; and every such instrument shall be deemed in all courts to have been issued in conformity with such Acts.⁴ So, the Dublin Gazette is conclusive evidence of any order published in it, which purports to have been made by the Lord Lieutenant in Council under the provisions of the Irish County Boundaries Acts.⁵ Again, all rules and special rules made under “the General Prisons, Ireland, Act, 1877,” either by the Lord Lieutenant or by the General Prisons Board, may be conclusively proved by the production of the Dublin Gazette, in which they have been published.⁶ So, the statutes, which respectively regulate the issue of Bank notes in England and Ireland,—after requiring the Commissioners of Stamps and Taxes to publish in the London and Dublin Gazettes respectively certificates containing certain particulars,—enact that the Gazette, in which such publication shall be made, shall be conclusive evidence in all courts of the amount of bank notes, which the banker named in the certificate is by law authorised to issue and have in circulation;⁷ the Irish Act adding, “exclusive of an amount equal to the monthly average amount of the gold and silver coin held by such banker as herein provided.”

¹ *R. v. Holt*, 5 T. R. 443, per Ld. Kenyon.

² See 29 & 30 V., c. 117, § 33; and 31 & 32 V., c. 59, § 29, Ir., cited ante, § 1620.

³ 19 & 20 V., c. 36, Ir.; 28 & 29 V., c. 118, Ir.; 38 V., c. 14, Ir.

⁴ 28 & 29 V., c. 118, § 2, Ir.; 34 & 35 V., c. 25, § 5.

⁵ 35 & 36 V., c. 48, § 3.

⁶ 40 & 41 V., c. 49, § 57, Ir. As to the proof of the English prison rules, ante, p. 1305, n. 3.

⁷ 7 & 8 V., c. 32, § 15; 8 & 9 V., c. 37, § 10, Ir.

§ 1664. Again, an order in Council under the City of London Parochial Charities Act, 1883, approving a scheme for the management of charity property, furnishes conclusive evidence that the scheme was within the scope of the Act; and neither the scheme nor the order can further be questioned in any legal proceeding.¹ So, also, an order in Council under the Extradition Act, 1870, becomes, on being published in the London Gazette, “conclusive evidence that the arrangement therein referred to complies with the requisitions of the Act, and that the Act applies in the case of the Foreign State mentioned in the order.”² So, the due publication of final notices, under the Acts relating to the drainage of lands in Ireland,³ may be conclusively proved by the production of the Dublin Gazette, in which they shall be published.⁴ So,—as already stated in another connexion,⁵—some of the most important proceedings in bankruptcy are capable of being proved, by the production of a copy of the Gazette in which they have been published. § 1477

§ 1665. Gazettes, in common with all other *newspapers*, are frequently offered in evidence with the view of fixing an adversary with *knowledge* of certain facts advertised therein; but here it is always advisable, and sometimes necessary,—unless the case is governed by a special Act of Parliament,—to furnish *some* evidence, from which the jury may infer that the party sought to be affected by the notice has read it. This doctrine applies even to cases where the notice published in the Gazette relates to some public matter, as, for instance, the blockade of a foreign port; for, although, as between nation and nation, the notification of a blockade may, from the moment it is made by one State to the government of another, bind all the subjects of the latter,⁶ this rule will not § 1478

¹ 46 & 47 V., c. 36, § 36.

² 33 & 34 V., c. 52, § 5.

³ 5 & 6 V., c. 89, Ir.; 8 & 9 V., c. 69, Ir.; 9 & 10 V., c. 4, Ir.; 10 & 11 V., c. 79, Ir.

⁴ 10 & 11 V., c. 79, § 4, Ir.

⁵ Ante, § 1549. The Irish Bankrupt and Insolvent Act, 1857, 20 & 21 V., c. 60, contains somewhat similar provisions in §§ 358, 364.

⁶ Neptunus, 2 Rob. Adm. R. 110, per Sir W. Scott; Adelaide, id. 112, n.

extend to suits between private individuals. Therefore where an action was brought on a ship policy, and the underwriters urged in defence, that the voyage was to a port which the master knew was blockaded, and that consequently the policy was void, the court held that the jury were justified in negating any knowledge on the part of the master, though it appeared that he was in this country some time after the publication of the Gazette in which the blockade was notified.¹

§ 1666. The Gazette containing a *a notice of dissolution of partnership* will, indeed, be admissible without any additional proof, as against all persons who have had no previous dealings with the firm;² and even against those who have had such dealings, it will, after formal proof of the actual dissolution by producing the deed, be evidence to show that the partnership was openly dissolved.³ Still, in order to deprive the old correspondents of the firm of their right of action against the retiring partner, further evidence must be given than the mere production of the Gazette in which notice of dissolution has been inserted;⁴ and if the defendant be not in a condition to prove that a circular was sent in due course to the plaintiff, he must at least show facts, from which an inference may be drawn that the plaintiff has seen the notice. This may be done in a variety of ways, as by proving that the plaintiff has been in the habit of taking in the Gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice, or has evinced an unusual interest in the affairs of the partnership, and the like.⁵ But it seems not enough to prove that the news-

¹ Harratt v. Wise, 9 B. & C. 712.

² Godfrey v. Turnbull, 1 Esp. 371, per Ld. Kenyon; Newsome v. Coles, 2 Camp. 617, per Ld. Ellenborough; Wright v. Pulham, 2 Chit. R. 121; Hart v. Alexander, 7 C. & P. 753, per Ld. Abinger.

³ Hart v. Alexander, 7 C. & P. 749, per Ld. Abinger.

⁴ Graham v. Hope, Pea. R. 154, per Ld. Kenyon.

⁵ Godfrey v. Macauley, Pea. R. 155, n.; Jenkins v. Blizzard, 1 Stark. R. 419, per Ld. Ellenborough; Hart v. Alexander, 2 M. & W. 484; Leeson v. Holt, 1 Stark. R. 186. As to notices by carriers restricting their liability, see 11

paper was circulated in the immediate neighborhood of the plaintiff's residence.¹

§ 1667. The *admissibility and effect of judicial records* and § 1480 documents must now be considered; and first, as to *judgments*. Here, if the object be merely to prove the *existence of the judgment, its date, or its legal consequences*, the production of the record, or the proof of an examined copy, is conclusive evidence of the facts against all the world. This rests on the ground that a judgment is a public transaction of a solemn character, which must be presumed to be faithfully recorded. Therefore, if a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive evidence for the plaintiff to establish the fact of acquittal, although the parties are necessarily not the same in the action as in the indictment;² but it is no evidence whatever, that the defendant was the prosecutor, even though his name appear on the back of the bill,³ or of his malice, or of want of probable cause;⁴ and the defendant, notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt.⁵ So, a judgment against a master or principal for the negligence of his servant or agent, is conclusive evidence against the servant or agent of the fact, that the master or principal has been compelled to pay the amount of damages awarded; but it is not evidence of the fact upon which it was founded, namely, the misconduct of the servant or agent. So, a judgment recovered against a surety will be evidence for him, to prove the amount which he has been compelled to pay for the principal debtor; but it furnishes no proof whatever

G. 4 & 1 W. 4, c. 68; *Munn v. Baker*, 2 Stark. R. 255; *Rowley v. Horne*, 3 Bing. 2. As to similar notices by Railway or Canal Companies, see 17 & 18 V., c. 31, § 7.

¹ *Norwich & Lowestoft Navig. Co. v. Theobald, M. & M.* 153, per Ld. Tenterden.

² *Legatt v. Tollervey*, 14 East, 302.

³ B. N. P. 14.

⁴ *Purcell v. Macnamara*, 9 East, 361; 1 Camp. 199, S. C.; *Incedon v. Berry*, 1 Camp. 203, n. a.

⁵ B. N. P. 15.

⁶ *Green v. New River Co.*, 4 T. R. 590; *Pritchard v. Hitchcock*, 6 M. & Gr. 165, per Cresswell, J.; *Tyler v. Ulmer*, 12 Mass. 166, per Parker, C. J.

of his having been legally liable to pay that amount through the principal's default.¹ The same doctrine will apply to other cases, where the party has a remedy over, as for contribution, or the like.² In an action against a surety, where the defence was that the plaintiff had received certain moneys from the principal in satisfaction of his damages, it was held that the plaintiff, on traversing this plea, might put in evidence a judgment recovered from him by the assignees of the principal for the amount so received as money had to their use, not indeed as conclusive proof that the money had been paid to him by the principal in the way of fraudulent preference, but as showing that he had actually repaid the money to the assignees, and as generally explaining the transaction.³

§ 1668. If the object be to discredit a witness, by proving that he has given different testimony on a former trial, the judgment in that cause, though the litigating parties be strangers, will be admissible for the purpose of introducing the evidence of his former statements.⁴ So, upon an indictment for perjury committed on a trial, the record will be evidence to show that such a trial was had;⁵ and if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody, will be conclusive evidence that the prisoner was convicted of the crime stated therein.⁶ So, where a man brought ejectment as heir-at-law, and, for the purpose of establishing his legitimacy, called his mother to prove her marriage before his birth, a statement made by her on cross-examination, that she had never been before certain magistrates to affiliate her son, was allowed to be contradicted by the production of a bastardy order, which purported

¹ *King v. Norman*, 4 Com. B. 884, 898.

² *Powell v. Layton*, 2 N. R. 371, per Mansfield, C. J.; *Kip v. Brigham*, 6 Johns. 158, 7 Johns. 168; *Griffin v. Brown*, 2 Pick. 304.

³ *Pritchard v. Hitchcock*, 6 M. & Gr. 151.

⁴ *Clarges v. Sherwin*, 12 Mod. 343; *Foster v. Shaw*, 7 Serg. & R. 156.

⁵ *R. v. Hles*, Cas. temp. Hardw. 118; B. N. P. 243; *R. v. Hammond* Page, 2 Esp. 649, n.

⁶ *R. v. Shaw*, R. & R. 526. A certificate of the conviction would also be evidence. See ante, §§ 1612—1614.

to have been made on her complaint in regard to the plaintiff by the magistrates in question.¹ So, in an action against a sheriff² for neglect in regard to an execution, it is usual to give in evidence judgments against third persons, to show the character in which the plaintiff claims, and the amount of damage he has sustained.³ So, if A. sues the sheriff for trespass to his goods, the latter may give in evidence a judgment against B., and then show that he seized the goods by virtue of a fieri facias upon that judgment, and that the goods belonged to B.⁴ So,⁵ where the judgment constitutes one of the muniments of a party's title to land or goods,—as where a deed was made under a decree in Chancery,⁶ or goods were purchased at a sale made by a sheriff upon an execution,⁷—the record may be given in evidence against a party who is a stranger to it. So, in an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate as his own property, has been held admissible on behalf of the defendant, not as proof of any of the facts therein stated, but for the purpose of explaining in what character the father, through whom the defendant claimed, had afterwards taken actual possession of the estate.⁸ Many other instances might be given of the admissibility of judgments inter alios, where the *record is matter of inducement*, or merely introductory to other evidence; but those cited will suffice to illustrate the principle.

§ 1669. Adjudications are sometimes tendered in evidence for § 1482 the purpose of *protecting* the magistrates who pronounced, and the officers who enforced, them, against an action of trespass. And here the rule of law is, that, provided the adjudication, when read

¹ *Watson v. Little*, 29 L. J., Ex. 267; 5 H. & N. 472, S. C.

² It should here be noted that a sheriff is no longer liable to an action for an escape, 40 & 41 V., c. 21, § 31; 40 & 41 V., c. 49, § 43, Ir.

³ *Davies v. Lowndes*, 1 Bing. N. C. 607, per Tindal, C. J.; *Adams v. Balch*, 5 Greenl. 188.

⁴ 1 St. Ev. 255.

⁵ Gr. Ev. § 539, as to three lines.

⁶ *Barr v. Gratz*, 4 Wheat. 213.

⁷ 1 St. Ev. 255; *Witmer v. Schlatter*, 2 Rawle, 359; *Jackson v. Wood*, 3 Wend. 27, 34; *Fowler v. Savage*, 3 Conn. 90, 96.

⁸ *Davies v. Lowndes*, 6 M. & Gr. 471, 520; 1 Bing. N. C. 607, S. C.

in connexion with the other proceedings, shows, either expressly or by fair and necessary inference, that the judge had jurisdiction over the subject-matter, it will furnish conclusive evidence of the truth of the facts stated in it, even if those facts are necessary to give the judge jurisdiction;¹ or, perhaps, it may be more correctly stated, that the production of the judgment, and of the proceedings on which it is founded, will be a bar to all inquiry respecting the truth or falsehood of the facts stated, and will conclusively establish the immunity of the judge.² The above doctrine, which is essential to the administration of the law,—since, without it, who would be found so bold as to act as a magistrate?—is occasionally prayed in aid for the protection of judges of even courts of record: because,—although by an excellent law of very great antiquity, no action will lie against such personages for an erroneous judgment, or for any other act done by them in the exercise of their judicial functions, and within the general scope of their jurisdiction.³—yet this protection does not extend to cases where the judge, either wilfully, or under a mistake not of fact but of law, acts wholly without jurisdiction.⁴ Still, the rule in question, though sometimes available on occasions of greater importance, is generally applied to, and will certainly be best illustrated by, those cases, in which justices of the peace have been sued by parties who imagined themselves wronged by a conviction or order.

§ 1670. *Brittain v. Kinnaird*⁵ is a leading authority on this subject. That was an action of trespass against magistrates for taking and detaining a vessel. At the trial it appeared that the vessel was

¹ See and compare *Taylor v. Clemson*, 2 Q. B. 1031, 1032, per Tindal, C. J., delivering the judgment of Ex. Ch.; *Basten v. Carew*, 3 B. & C. 652, 653, per Ld. Tenterden; *Brittain v. Kinnaird*, 1 B. & B. 437, per Dallas, C. J.; 442, 443, per Richardson, J.; *Betts v. Bagley*, 12 Pick. 572, 582, per Shaw, C. J.

² *Aldridge v. Haines*, 2 B. & Ad. 408, per Parke, J.; 1 St. Ev. 255.

³ *Garnett v. Ferrand*, 6 B. & C. 611, 625; 9 D. & R. 657, S. C.; *Floyd v. Barker*, 12 Co. 25; *Fray v. Blackburn*, 3 B. & S. 576; *Scott v. Stansfield*, 3 Law Rep., Ex. 220; 37 L. J., Ex. 155, S. C.

⁴ *Houlden v. Smith*, 14 Q. B. 841; *Calder v. Halket*, 3 Moo. P. C. R. 28.

⁵ 1 B. & B. 432. In *Mould v. Williams*, 5 Q. B. 473, Coleridge, J., observed, “*Brittain v. Kinnaird* has been oftener recognised than almost any modern case.” See *Ayrton v. Abbott*, 14 Q. B. 1.

seized by the defendants, as magistrates, under the Bum-boat Act now repealed,¹ and the plaintiff sought to prove that it was not a boat within the meaning of the Act; but this he was not permitted to do, on the ground that the conviction was the only evidence of what the magistrates had determined. The conviction was then put in, and as no defects appeared upon the face of it, and as the vessel was there called a boat, it was held to constitute a conclusive defence to the action, and the plaintiff was accordingly nonsuited. On a motion for a new trial, it was strongly urged that the magistrates had no right to assume to themselves jurisdiction, by calling that a boat which was in fact a ship; and was asked whether a justice could seize a seventy-four gun vessel, and then justify the legal detention by describing it in the conviction as a boat. To this it was answered by the court, that, supposing such a thing done, the conviction would still be conclusive, and the party would be without civil remedy, though a decision so gross would undoubtedly be good ground for a criminal proceeding against the justice;² and Richardson, J., observed, "whether the vessel in question were a boat or not, was a fact on which the magistrate was to decide, and the fallacy is in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction."³

§ 1671. Again, where a justice, acting under the Highway Act,⁴ § 1484 had issued an order for the removal of certain timber encumbering the highway, and an action of trespass was in consequence brought against him by the owner of the timber, it was held that the plaintiff could not prove, in contradiction to the order, that the place where the wood was lying was no part of the highway.⁵ So, where two magistrates were sued in trespass for having given the plaintiff's landlord possession of a farm as a deserted farm, under the Act of 11

¹ 2 G. 3, c. 28; repealed by 2 & 3 V., c. 47, § 24.

² 1 B. & B. 438, 439; cited with approbation by Coleridge, J., in *R. v. Buckinghamshire Js.*, 3 Q. B. 809.

³ 1 B. & B. 442, cited by Ld. Denman as an admirable judgment in *R. v. Bolton*, 1 Q. B. 74.

⁴ 5 & 6 W. 4, c. 50, § 73.

⁵ *Mould v. Williams*, 5 Q. B. 469.

G. 2, c. 19, § 16, the production of the record of their proceedings, which set forth the facts necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute, was held to be a conclusive answer to the action, and the plaintiff, consequently, was not permitted to prove that the farm, in point of fact, was not deserted.¹ Many other cases might be cited in support of the general proposition, that where (supposing the facts alleged to be true) a magistrate or other judicial personage has jurisdiction, his jurisdiction, and consequent immunity from an action, cannot be made to depend upon the truth or falsehood of those facts, or on the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them.²

§ 1672. It must be carefully remembered, that this rule *protects* § 1485
justices only when acting in a *judicial* capacity. Therefore, if an action of trespass be brought against magistrates for issuing a warrant of distress to enforce payment of a highway-rate, they will have no defence, should the rate prove invalid; for although the rate must be good in order to give them jurisdiction, they cannot judicially decide upon its validity, and the consequence is, that their warrant cannot be any evidence, still less conclusive evidence, of any fact on which the validity of the rate depends.³ The same doctrine applies to warrants of distress for borough rates issued by the mayor;⁴ and it was also formerly applicable to all distress warrants, which had been granted by justices for the purpose of compelling the payment of a poor-rate. It is now, however, enacted by § 4 of the Act of 11 & 12 V., c. 44, "that, where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action

¹ *Basten v. Carew*, 3 B. & C. 649.

² *Cave v. Mountain*, 1 M. & Gr. 257, 262, cited with approbation in *R. v. Bolton*, 1 Q. B. 75; *In re Clarke*, 2 Q. B. 619; *Anon.*, 1 B. & Ad. 382; *R. v. Walker*, 2 M. & Rob. 457, per Coltman, J.; *Gray v. Cookson*, 16 East, 13; *R. v. Hickling*, 7 Q. B. 880.

³ *Mould v. Williams*, 5 Q. B. 476, per Ld. Denman; *Weaver v. Price*, 3 B. & Ad. 409; *Morrell v. Martin*, 3 M. & Gr. 593, per Tindal, C. J.; *Ld. Amherst v. Ld. Somers*, 2 T. R. 372; *Nicholls v. Walker*, Cro. Car. 394.

⁴ *Fernley v. Worthington*, 1 M. & Gr. 491. See *Newbould v. Coltman*, 6 Ex. R. 189.

shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein."

§ 1673. In many cases a judgment is tendered in evidence, not merely to prove its existence and its legal consequences, or to protect the party who pronounced it against legal proceedings, but in order to *conclude an opponent upon the facts determined*; and for this purpose, the rules which govern the admissibility of the record will vary according to the nature of the judgment. Thus, if it be a *judgment in rem*, it will bind all persons whomsoever; and this too, probably, although it has not been pleaded;¹ but if it be a *judgment inter partes*, it will, in general, bind only parties and privies thereto;² and even as against them, it will not, as it seems, be regarded as absolutely conclusive evidence, unless it be specially pleaded by way of estoppel.³ § 1486

§ 1674. A *judgment in rem* has been defined by an able writer to be "an adjudication pronounced, as its name indeed denotes, upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose."⁴ This definition is given as the best, if not the only intelligible one, to be found in the books; but still, too much reliance must not be placed upon it, as it would seem to include convictions on criminal prosecutions, inquisitions in lunacy, inquisitions post mortem, and several other species of judicial decisions, which, if judgments in rem at all, are at least not governed by the same rules of evidence as are generally applicable to adjudications of that nature. For instance, the characteristic quality of a judgment in rem is, that it furnishes, in general, *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties; but this rule does not extend, either to § 1487

¹ See 2 Smith, L. C. 661, 682; *Hannaford v. Hunn*, 2 C. & P. 155, per Abbott, C. J.; *Cammell v. Sewell*, 3 H. & N. 646, 647; *id.* 5 H. & N. 742; *Magrath v. Hardy*, 4 Bing. N. C. 796, per Tindal, C. J.

² 2 Smith, L. C. 664, 668.

³ Ante, § 91; post, § 1684.

⁴ 2 Smith, L. C. 662.

criminal convictions, which are subject to the same rules of evidence as ordinary judgments *inter partes*; ¹ or to inquisitions in lunacy, inquisitions post mortem, or other inquisitions, which though regarded as judgments in rem, so far as to be admissible in evidence of the facts determined against all mankind, are, for some unexplained reason, considered as not conclusive evidence.² Thus, it has been repeatedly ruled, that an inquisition in lunacy,³ though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry;⁴ and the same rule has been applied to most other inquisitions.⁵

§ 1675. Though, for the reason just given, Mr. Smith's definition of a judgment in rem cannot be considered perfect, yet it would be extremely difficult, if not impossible, to enunciate any other, which would be open to fewer objections. Without, therefore, § 1483

¹ *R. v. Turner*, 1 Moo. C. C. 347; 1 Lew. C. C. 119, S. C.; *R. v. Ratcliffe*, 1 Lew. C. C. 122; *R. v. Blakemore*, 2 Den. 410; *Keable v. Payne*, 8 A & E. 560; *Blakemore v. Glamorg. Can. Co.*, 2 C. M. & R. 139, per Parke, B., explaining *Smith v. Rummens*, 1 Camp. 9; and *Hathaway v. Barrow*, id. 151. See post, § 1693.

² *The Irish Society v. Bp. of Derry*, 12 Cl. & Fin. 666.

³ See 16 & 17 V., c. 70, § 38, et seq., and 25 & 26 V., c. 86, § 4.

⁴ *Faulder v. Silk*, 3 Camp. 126, per Ld. Ellenborough; *Hassard v. Smith*, 1 R., 6 Eq. 429; *Dane v. Kirkwall*, 8 C. & P. 683, per Patteson, J.; *Frank v. Frank*, 2 M. & Rob. 315, 316, n.; *Sargeson v. Sealy*, 2 Atk. 412; *Bannatyne v. Bannatyne*, 2 Roberts. 475—477; *Hume v. Burton*, 1 Ridg. P. C. 204; *Den v. Clark*, 5 Halst. 217; *Hart v. Deamer*, 6 Wend. 497. See *Prinsep & E. India Co. v. Dyce Sombre*, 16 Moo. P. C. R. 232, 239, 244—247.

⁵ *Stokes v. Dawes*, 4 Mason, 268, per Story, J. In *Jones v. White*, 1 Str. 68, the court was divided upon the question, whether a coroner's inquest, finding a person who had destroyed himself lunatic, was admissible at all as evidence of his insanity on an issue on that fact. An inquisition by a sheriff's jury, taken prior to the Interpleader Act, 1 & 2 W. 4, c. 58, for the purpose of ascertaining to whom goods seized under a *fi. fa.* belonged, has been held to be wholly inadmissible, as not being an inquisition under the Queen's writ, but merely a proceeding by the sheriff of his own authority; *Glessep v. Pole*, 3 M. & Sel. 175; *Latkow v. Eamer*, 2 H. Bl. 437. See *Read v. Victoria St. & Pimlico Ry. Co.*, 1 H. & C. 826; 32 L. J., Ex. 167, S. C.; *Horrocks v. Metropolitan Ry. Co.*, 4 B. & S. 315; *Chapman v. Monmouths, Ry. & Can. Co.*, 2 H. & N. 267; and *R. v. Lond. & N. West. Ry. Co.*, 3 E. & B. 443, as to the effect of an inquisition before a sheriff's jury under § 68 of the Lands Clauses Consol. Act, 1845, 8 & 9 V., c. 18.

attempting a task, which a long series of unsystematic decisions would render hopeless, it may be deemed sufficient for all practical purposes, to furnish a tolerably correct *list* of those adjudications, which may, with a reasonable degree of certainty, be regarded as *judgments in rem*. This list will be found to contain judgments of condemnation of property as forfeited, whether pronounced by the old Court of Exchequer,¹ or now by the Queen's Bench Division on the Revenue side, or by the commissioners or sub-commissioners of excise, inland revenue,² or customs;³—adjudications in the old Court of Admiralty, now called the Probate Divorce and Admiralty Division, on the subject of prize,⁴—or for the enforcement of a maritime lien;⁵—sentences of divorce *a mensâ et thoro*⁶ under the old law, and of judicial separation, under the existing law;⁷—decrees dissolving marriage;⁸—decrees in other matrimonial suits,⁹ provided the *status* of the parties be effected thereby,¹⁰ but not

¹ *Geyer v. Aquilar*, 7 T. R. 696, per Ld. Kenyon; *Scott v. Shearman*, 2 W. Bl. 977; *Cooke v. Sholl*, 5 T. R. 255.

² 12 & 13 V., c. 1, § 3.

³ *Maingay v. Gahan*, Ridg. L. & S. 1, 79; 1 Ridg. P. C. 43, 44, n., S. C. There the Irish Ex. Ch. expressly overruled *Henshaw v. Pleasance*, 2 W. Bl. 1174, a decision which, according to Fitzgibbon, Ch., see Ridg. L. & S. 79, was reprobated by Ld. Mansfield in *Dixon v. Cock*, and was frequently condemned by Ld. Lifford, Ch. See, also, *Roberts v. Fortune*, 1 Harg. L. Tracts, 468, n., per Lee, C. J.; *Terry v. Huntingdon*, Hardr. 480; and *Fuller v. Fotch*, Carth. 346, all which cases are also at variance with *Henshaw v. Pleasance*.

⁴ *Le Caux v. Eden*, 2 Doug. 612, per Buller, J.; *Lindo v. Rodney*, id. 614, per Ld. Mansfield. For other proceedings in rem in the Court of Admiralty, see *Harmer v. Bell*, 7 Moo. P. C. R. 267; and see, also, *Cammell v. Sewell*, 3 H. & N. 617; 5 H. & N. 742, S. C.; *Simpson v. Fogo*, 1 Johns. & Hem. 18; 1 Hem. & M. 195, S. C.; *Castrique v. Imrie*, 4 Law Rep., H. L. 414; 39 L. J., C. P. 350, in Dom. Proc., and *Imrie v. Castrique*, 8 Com. B., N. S. 405, per Ex. Ch., overruling *Castrique v. Imrie*, id. 1.

⁵ *The City of Mecca*, 49 L. J., P. D. & Ad. 17. The original action in this case was to recover damages for collision.

⁶ *R. v. Grundon*, 1 Cowp. 322, per Ld. Mansfield; *Day v. Spread*, Jebb & B. 163.

⁷ 20 & 21 V., c. 85, §§ 7 & 16.

⁸ Id. §§ 27 & 31.

⁹ *Da Costa v. Villa Real*, 2 Str. 961; *Bunting's case*, 4 Co. 29; *Kenn's case*, 7 Co. 42; *Perry v. Meddowcroft*, 10 Beav. 122; *Harrison v. Corp. of Southampton*, 22 L. J., Ch. 372. But see *Goodin v. Smith*, Milw., Ec. Ir. R. 243—245. As to decrees under "The Legitimacy Declaration Act, 1858," see that Act, 21 & 22 V., c. 93; and *Shedden v. Att.-Gen. & Patrick*, 2 Swab. & Trist. 170; 30 L. J., Pr. & Mat. 217, S. C.

¹⁰ *Needham v. Bremner*, 1 Law Rep., C. P. 583; 35 L. J., C. P. 313; and (4302)

decrees in suits for jactitation of marriage, unless, *perhaps*, in cases where the defendant pleads a marriage, and the court decides on the truth of that plea;¹—grants of probate;²—and administration;³—adjudications in bankruptcy;⁴—sentences of deprivation and expulsion, whether delivered by the Spiritual Court, a visitor, or a college;⁵—old judgments of outlawry;⁶—adjudications of settlement by an order of justices, whether unappealed against,⁷ or confirmed by a Court of Quarter Sessions on appeal:⁸—orders of justices for dividing roads under the Act of 34 G. 3, c. 64;⁹—and, perhaps, sentences of courts martial.¹⁰

§ 1676. These judgments so far furnish conclusive evidence of the points they decide, not only against the parties who were the actual litigants in the cause, but against all others, that, unless it can be shown, either that the court had no jurisdiction,¹¹ or that the judgment was obtained by fraud or collusion,¹² no evidence can be admitted, at least in any civil cause,¹³ for the purpose of disproving the facts adjudicated. This rule appears to rest, partly, upon the ground, that in most of the above cases every one who can possibly be affected by the decision is entitled, if he think fit, to appear and assert his own rights, by becoming an actual party to the proceed-

1 H. & R. 731, S. C. See *Conradi v. Conradi*, 1 Law Rep., P. & D. 514.

¹ R. v. Duch. of Kingston, 20 How. St Tr. 543; 2 Smith, L. C. 642, 646, 676, S. C.

² *Noel v. Wells*, 1 Lev. 235, 236; *Allen v. Dundas*, 3 T. R. 125.

³ *Bouchier v. Taylor*, 4 Br. P. C. 708. See *Prosser v. Wagner*, 1 Com. B., N. S. 289.

⁴ See post, § 1747.

⁵ *Phillips v. Bury*, 2 T. R. 346, per Ld. Holt; *R. v. Grundon*, 1 Cowp. 315, 321, 322, per Ld. Mansfield.

⁶ 2 Co. Lit. 352, b. Outlawry in civil proceedings is at length abolished by 42 & 43 V., c. 59, § 3.

⁷ *R. v. Kenilworth*, 2 T. R. 599, per Buller, J.

⁸ *R. v. Wick St. Lawrence*, 5 B. & Ad. 533, per Ld. Denman.

⁹ *R. v. Hickling*, 7 Q. B. 880.

¹⁰ 2 Smith, L. C. 681. See *R. v. Suddis*, 1 East, 306; *Hannaford v. Hunn*, 2 C. & P. 148; *Grant v. Gould*, 2 H. Bl. 100.

¹¹ Post, § 1714, et seq.

¹² *R. v. Duch. of Kingston*, 20 How. St. Tr. 544; 2 Smith, L. C. 642, 656, S. C. See post, § 1713.

¹³ As to the effect of judgments in rem in criminal trials, see post, § 1680.

ings;¹ partly, upon the ground, that judgments *in rem* not merely declare the *status* of the subject-matter adjudicated upon, but, *ipso facto*, render it such as they declare it to be;² and partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society, that the social relations of every member of the community should not be left doubtful, but, that after having been clearly defined by one solemn adjudication, they should conclusively be set at rest.

§ 1677. Though a judgment *in rem* is thus binding upon all the world as to the precise point directly decided, and, consequently, the decision cannot be impeached in the same or another court, by showing that the facts on which it immediately rests are false;—yet, where these facts are themselves put directly in issue in a subsequent suit, the judgment does not,—with one exception which will be presently mentioned,³—furnish conclusive evidence of their truth, however necessary it may have been for the court proceeding *in rem* to have determined that question before it adjudicated upon the principal point.⁴ Thus, although the Ecclesiastical Courts *were* not, and the existing Probate Division of the High Court *is* not, authorised to grant letters of administration, unless the intestate be *dead*, these letters are so far from being conclusive evidence of the death, when that fact is put in issue in another court, that on one or two occasions they have not been regarded even as *prima facie* proof.⁵ However, in one case, where the question raised was whether a child had been born alive or dead, Lord Chancellor Sugden held, that a grant of letters of administration to its effects was a fact from which, in the absence of evidence to the contrary, he was bound to presume that the child was born alive.⁶ Again,

¹ 1 St. Ev. 286. This is not an essential foundation for the rule, as it has been held that a sentence of nullity of marriage will be binding upon, and have the effect of bastardising, a child of the parties, who at the time when the sentence was pronounced was *en ventre sa mère*. *Perry v. Meddowcroft*, 10 Beav. 122.

² 2 Smith, L. C. 662, 663.

³ Post, § 1678.

⁴ See *Bailey v. Harris*, 12 Q. B. 905.

⁵ *Thompson v. Donaldson*, 3 Esp. 63; *Moons v. De Bernaldes*, 1 Russ. 301; *French v. French*, 1 Dick. 268.

⁶ *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 349.

though a probate cannot be granted until the Probate Division be satisfied of the genuineness of the will, and though, when granted, the title of the executor cannot be impeached in a court of law by showing that the will was forged,¹ still, if a party be indicted for forging the will, the probate will not be conclusive, if indeed it be *prima facie*, evidence in favour of the defendant.² Neither would the production of a probate preclude a party from showing in a common-law court, either that the testator was insane at the time when he executed the will,³ or that his domicile was not then in England,⁴ provided the object of this evidence were not to impeach the title of the executor, in which case it would be inadmissible.⁵

§ 1678. An exception to the above rule is recognised in cases, § 1491 where it appears on the face of the proceedings *in rem* that the fact on which the principal point depended, was itself put *directly in issue*, and was *actually decided* by the court. Here, if this fact be again controverted between the *same parties*, or persons claiming under them,⁶ whether in the same or in a different court, the judgment *in rem* will, almost universally,⁷ be conclusive upon the question. For instance, if, in a suit for administration, the sole question be, which of two parties is next of kin to the intestate, the sentence of the Probate Division, declaring "that, as far as appears by the evidence, the defendant has proved himself next of kin," and the administration be granted to him as such, will be conclusive evidence of the relative relationship of the parties in a subsequent action between them for distribution, instituted in the Chancery Division.⁸ The judgment in such a case would be equally

¹ Noel v. Wells, 1 Lev. 235, 236.

² R. v. Buttery, R. & R. 342; R. v. Gibson, id. 343, n., per Ld. Ellenborough, overruling R. v. Vincent, 1 Str. 481.

³ Marriot v. Marriot, 1 Str. 671.

⁴ Whicker v. Hume, 7 H. of L. Cas. 124, 156, per Ld. Cranworth; Bradford v. Young, L. R., 29 Ch. D. 656, 667, per Pearson, J.

⁵ See cases in last two notes.

⁶ See Spencer v. Williams, 2 Law Rep., P. & D. 230; 40 L. J., Pr. & Mat. 45, S. C.

⁷ See post, § 1685.

⁸ Barrs v. Jackson, 1 Phill. 582, 587, 588, per Ld. Lyndhurst; Bouchier v. Taylor, 4 Br. P. C. 708; Harg. L. Tracts, 473, S. C.; Doglioni v. Crispin, 35 L. J., Pr. & Mat. 129; 1 Law Rep., H. L. 301, S. C.

conclusive on the parties, if the question of kindred had been determined by the court, not as a matter of fact, but as a point of law.¹ To, the dismissal of a wife's petition for judicial separation charging cruelty, is a bar to a subsequent petition for a dissolution of the marriage charging the same cruelty coupled with adultery.² So, where, on appeal against an order of justices removing three paupers as the children of A. and B., the respondents relied upon a confirmed order for the removal of "A. and *his wife* B." from the respondent to the appellant parish, it was held that the appellants were conclusively estopped by this order, from showing that the children were illegitimate, in consequence of A. having committed bigamy in marrying B.³ Indeed, it has been lain down broadly, with respect to orders of removal unappealed against, or confirmed on appeal, that they are not only evidence, but conclusive, as to all the *facts mentioned* in them, and which are *necessary steps* to the decision.⁴

§ 1679. In the case of *R. v. Wye*,⁵ a curious question arose, in consequence of two *conflicting judgments in rem* having been pronounced. A pauper and his wife and their six children were removed by an order of justices, which was confirmed on appeal. Subsequently, the Spiritual Court declared the marriage of these paupers void on the ground of being incestuous.⁶ One of the children, born before the date of the order, but not named in it, was afterwards removed to the appellant parish, as the place of his father's settlement. The parish appealed, and relied on the decree of the Ecclesiastical Court; but the respondents urged, on the authority of *R. v. Woodchester*,⁷ that the former order for

¹ *Thomas v. Ketteriche*, 1 Ves. Sen. 333, per Ld. Hardwicke, recognised by Ld. Lyndhurst in *Barrs v. Jackson*, 1 Phill. 587.

² *Finney v. Finney*, 1 Law Rep., P. & D. 483; 37 L. J., Pr. & Mat. 43, S. C.

³ *R. v. Woodchester*, Burr. S. C. 191; 2 Str. 1172, S. C.; *R. v. St. Mary, Lambeth*, 6 T. R. 615.

⁴ *R. v. Wye*, 7 A. & E. 770, per Ld. Denman; *R. v. Hartington Middle Quarter*, 4 E. & B. 780.

⁵ 7 A. & E. 761.

⁶ See now 5 & 6 W. 4, c. 54.

⁷ Burr. S. C. 191; 2 Str. 1172, S. C.

removing the parents as man and wife was conclusive evidence of the legitimacy of the present pauper. A case being reserved for the opinion of the Queen's Bench, that court decided in favour of the appellants, upon the ground that a *new state of facts* had arisen since the former order, the marriage, which at that time was only voidable, having since been declared void by competent authority.

§ 1680. Whether a judgment in rem is conclusive in a *criminal* § 1493 proceeding is a question which admits of some doubt. In the Duchess of Kingston's case, the judges expressed a decided opinion in the negative, urging first, that it would be contrary to public policy, that the temporal courts, in the investigation of a criminal charge should be bound by a decision, perhaps, of an ecclesiastical judge, addressed only to a conscience of the party, and founded, as it might be, on evidence inadmissible at common law; and next, that if such a decision were conclusive in favour of a prisoner, it would be equally binding against him; and, consequently, his life, liberty, property, and fame might depend upon the judgment of a court, which had no organs to discover whether he had committed a crime or not.¹ On the other hand, it has been contended that this opinion of the judges, when taken apart from the reasons on which it is founded, is not entitled to much weight, it being merely an obiter dictum unnecessary for the decision of the points submitted to them;² and then, in answer to the reasons, it is said that nothing can be more inconvenient or dangerous than a conflict of decisions between different courts; and that, if judgments in rem are not regarded as binding upon all courts alike, the most startling anomalies may occur.

§ 1681. The authorities reported in the books throw little light § 1494 upon the subject. *R. v. Buttery*³ is sometimes cited as confirming the opinion of the judges in the Duchess of Kingston's case, but in fact it lends little, if any, support to that opinion; for the only

¹ 20 How. St. Tr. 540—543; 2 Smith, L. C. 642, S. C.

² 2 Smith, L. C. 676, 677.

³ R. & R. 342, cited ante, § 1677.

point there determined was, that, if a party be indicted for forging a will, the mere production of the probate is not conclusive evidence of its validity; a doctrine which is unquestionably sound law, but which,—as before stated,¹—would apply equally to a civil action, provided the object were not to dispute the title of the executor. On the other hand, where the inhabitants of a parish were indicted for not repairing a road, and an order of justices for dividing the road was put in on behalf of the prosecution, the court held that, as this order pursued the form given by the Act of 34 G. 3. c. 64, it was conclusive of the liability of the defendants to repair the portion of the road allotted to them, and they were consequently not allowed to prove, that, in fact, no part of the road ever was within their parish.² This case, however, is one of little authority on the present question, since it was determined, without any reference to the fact of its being an indictment, as coming within the principle of *Brittain v. Kinnaïrd*.³ It may be added, that in *R. v. Grundon*,⁴ which was an indictment for an assault upon an undergraduate of Queen's College, Cambridge, in turning him out of the college garden, the production of a sentence of expulsion was held to constitute a conclusive defence.

§ 1682. Judgments *inter partes*, or, as they are sometimes called, § 1495 judgments *in personam*, are not,—with one exception,—admissible either for or against *strangers* in proof of the facts adjudicated.⁵ They are not admissible against them, because it is an obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of which he could, therefore, have exercised no control; or, to express the same sentiments in technical language, *res inter alios actæ alteri nocere non debent*;⁶ and they cannot be received in their favour even as against a party thereto, because it is thought, with very questionable pro-

¹ Ante, § 1677.

² *R. v. Hickling*, 7 Q. B. 880.

³ 1 B. & B. 432.

⁴ 1 Cowp. 315.

⁵ See *Shedden v. Att.-Gen. & Patrick*, 30 L. J., Pr. & Mat. 217, 227—231; 2 Swab. & Trist. 170, 179—181, S. C.

⁶ B. N. P. 232.

priety, that the previous rule might work injustice, unless its operation were *mutual*.¹

§ 1683. The *exception* just stated is allowed in favour of verdicts, § 1496 judgments, and other adjudications upon subjects of a *public nature*,² such as customs,³ prescriptions,⁴ tolls,⁵ boundaries between parishes, counties, or manors,⁶ rights of ferry,⁷ liabilities to repair roads⁸ or sea walls,⁹ moduses,¹⁰ and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications, —which for this purpose are regarded as a species of reputation,—will also be received, and this too, whether the parties in the second suit be those who litigated the first, or be utter strangers.¹¹ The effect, however, of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment; but if the litigants in the second suit be strangers to the parties in the first, the judgment, though admissible, will not be conclusive.¹²

§ 1684. Though a judgment *inter partes* is thus seldom admis- § 1497 sible, and never conclusive, evidence of the facts adjudicated, either for or against strangers, it is always,—with one exception which will be explained in the next section,—admissible for or against *parties* or *privies*, where the same subject matter is a second time in controversy between the same parties or persons claiming under them.¹³

¹ *Smith v. Rummens*, 1 Camp. 9; *Hathaway v. Barrow*, id. 151; *Blakemore v. Glamorganshire Can. Co.*, 2 C. M. & R. 139, per Parke, B.; Co. Lit. 352 a, cited and approved of in *Gaunt v. Wainman*, 3 Bing. N. C. 70, per Tindal, C. J.; and in *Doe v. Errington*, 6 Bing. N. C. 83, per id.; ante, § 99. See, also, *Greely v. Smith*, 1 Woodb. & M. 181.

² *Mulholland v. Killen*, 1 R., 9 Eq. 471.

³ *Reed v. Jackson*, 1 East, 357, per Ld. Kenyon; *Berry v. Banner*, Pea. R. 156.

⁴ Id.

⁵ B. N. P. 233.

⁶ *Brisco v. Lomax*, 8 A. & E. 198; *Evans v. Rees*, 10 A. & E. 151, 153.

⁷ *Pim v. Curell*, 6 M. & W. 234; *Hemphill v. M'Kenna*, 8 Ir. Law R. 43.

⁸ *R. v. St. Pancras*, Pea. R. 220; *R. v. Haughton*, 1 E. & B. 501.

⁹ *R. v. Leigh*, 10 A. & E. 398.

¹⁰ *Croughton v. Blake*, 12 M. & W. 205, 209.

¹¹ Cases cited in last nine notes; ante, §§ 624—627.

¹² *Reed v. Jackson*, 1 East, 357; *Croughton v. Blake*, 12 M. & W. 205.

¹³ *Duch. of Kingston's case*, 20 How. St. Tr. 538; B. N. P. 232; *Ferrers v.* (4309)

Probably, indeed, it will not be regarded as quite conclusive of the rights in dispute, unless it be pleaded as matter of estoppel;¹ but certainly it will furnish highly cogent evidence, which cannot be disregarded by a jury, excepting upon good and substantial grounds.² The conclusive effects of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom, that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.

§ 1685. The exception referred to in the last preceding section § 1497A is recognised in the very rare event of two suits being tried on different principles so far as relates to the admissibility of evidence. Here the judgment obtained in the first suit, whether it be a judgment *inter partes*, or judgment *in rem*, cannot be received as any evidence of the facts adjudicated thereby, even though the same facts be again in dispute. For instance, in a suit by a husband for dissolution of marriage on the ground of his wife's adultery, the wife could not, prior to the 9th of August, 1869,³ in support of her answer charging cruelty and desertion, rely on a decree of judicial separation which she had already obtained on these grounds, after having been examined herself as a witness; for, as in the second suit her testimony was, under the old law, inadmissible, to admit the decree would in effect have admitted her evidence at second hand, and thus would have done indirectly what the law forbade to be directly done.⁴

Arden, 6 Rep. 7, Cro. El. 668, S. C.; *Sopwith v. Sopwith*, 30 L. J., Pr. & Mat. 131; 2 Swab. & Trist. 160, S. C.

¹ Ante, §§ 91, 1673; *Joly v. Swift*, 11 Ir. Eq. R. 410; *Nowlan v. Gibson*, 12 Ir. Law R. 5, 8—12, per Pigot, C. B.

² *Outram v. Morewood*, 3 East, 365, per Ld. Ellenborough; *R. v. Blakemore*, 2 Den. 410.

³ When the Act 32 & 33 V., c. 68, passed. See ante, § 1355.

⁴ *Stoate v. Stoate*, 30 L. J., Pr. & Mat. 102, per Cresswell, J. O.; 2 Swab. & Trist. 223, S. C.; *Bancroft v. Bancroft & Rumney*, 34 L. J., Pr. & Mat. 14. But see *Sopwith v. Sopwith*, 30 L. J., Pr. & Mat. 131, where the Judge Ordinary, while verbally recognising the exception as above stated, practically set it at naught. S. C., 2 Swab. & Trist. 160. See, also, *Bland v. Bland*, 35 L. J., Pr. & Mat. 104.

§ 1686. Under the term *parties* in this connexion, the law includes *all* those who are *individually named in the record*, and who are consequently entitled to prosecute or defend the cause, to adduce testimony, to cross-examine witnesses called on the other side, and to appeal from the judgment, should an appeal be allowable by law.¹ Even a party, who has been sued as the public officer of a bank, has been held in Ireland to be amenable to this rule, though it was urged in his favour that the judgment relied on had been obtained against him *en autre droit*.² However, a *prochein amy* is not such a party, being considered simply as a person appointed by the court to look after the interests of the infant, and to manage the suit for him;³ but the infant himself is a party, and will, consequently, be bound by the judgment in any action brought in his name by his *prochien amy* duly appointed, even though the suit may have been instituted and conducted without his authority or knowledge.⁴ Neither will the law, in such a case, recognise any distinction between infants of tender and of mature years; and, therefore, where the wife of a minor committed adultery, whilst her husband was abroad in the East Indies, and the father, having procured himself to be appointed *prochein amy*, commenced an action for criminal conversation in his son's name, but without his knowledge, the court held that the son would be bound by the judgment in this action.⁵ But if a person *sui juris* be made a party to a suit without his knowledge or consent, he will not be bound by the proceedings; and therefore, if a plaintiff, instead of serving a defendant with process, thinks fit to accept the appearance of an unauthorised solicitor for him, he runs the risk of having the judgment subsequently set aside as irregular, with costs.⁶ So, where a debtor, on action brought, paid his debt to the solicitor who was suing him in the name, but without the authority, of the creditor, it was held that this payment did not discharge him.⁷ In such a case as the last, the defendant should apply to the court, who will stay the

§ 1498

¹ *Duch. of Kingston's case*, 20 How. St. Tr. 538. n.; ² *Smith*, L. C. 642, S. C.

³ *Spencer v. Thompson*, 6 Ir. Law R., N. S. 537, 566.

⁴ *Sinclair v. Sinclair*, 13 M. & W. 640.

⁵ *Morgan v. Thorne*, 7 M. & W. 400.

⁶ *Id.*

⁷ *Bayley v. Buckland*, 1 Ex. R. 1.

⁸ *Robson v. Eaton*, 1 T. R. 62.

proceedings, and compel the solicitor to pay the costs incurred in the defence.¹

§ 1687. Whether the term *parties* will also include persons not named in the record, but in *whose immediate and individual behalf the action has been brought or defended*, may admit of some doubt. The case of *Kinnersley v. Orpe*² is said to have decided this point in the affirmative;³ but this, it is submitted, is a mistake. That was an action brought to recover penalties from a servant of one Cotton for fishing in the plaintiff's fishery. The plaintiff, in support of his right to the fishery, produced no other proof than the record of a verdict and judgment recovered by him against another servant of Cotton, in a former action for a trespass committed on the same fishery. In both actions the servants justified as acting by the orders of their master, who claimed a right to the fishery in question. The judge at Nisi Prius, considering Cotton as the real defendant in both actions, held the record to be conclusive, and directed the jury to find for the plaintiff, which they did. A new trial was, however, subsequently granted, the court intimating that the record, though admissible evidence, was not conclusive. As no reasons are given for this opinion, the case would be one of little authority, even had it never been questioned; but its value becomes much less, when we find Lord Ellenborough, in his well-considered judgment in *Outram v. Morewood*,⁴ expressing his astonishment that an estoppel in such a case could ever have been supposed possible; and then, in the shape of a doubt, intimating a tolerably clear opinion that the record was wholly inadmissible, as the defendant was no party to the former action.

§ 1688. However, thus much has been established, that, under the old law relative to actions of ejectment, the lessor of the plaintiff

¹ *Hubbard v. Phillips*; 13 M. & W. 702.

² 2 Doug. 517.

³ Thus, in *Simpson v. Pickering*, 1 C. M. & R. 529, Alderson, B., observes as an obiter dictum, "*Kinnersley v. Orpe* shows that the verdict may be given in evidence where the parties are *really* the same." See, also, 2 Ph. Ev. 7; and *Doe v. E. of Derby*, 1 A. & E. 791, per Littledale, J.

⁴ 3 East, 366. See *Case v. Reeve*, 14 Johns. 81, 82.

and the tenant in possession must be regarded as having been the real parties; and, consequently, any judgment in such an action, whether upon verdict, or by default against the casual ejector, would be cogent, if not conclusive, evidence in any subsequent action to recover land between the same parties, provided it were brought respecting the same property.¹ So, the landlord, or other person, in whose right a defendant in replevin has made cognizance, has been held to be a party to that suit;² and it would certainly be convenient and reasonable if the rule,—in conformity with that which governs admissions,³—were extended to all persons who were *substantially* parties to the former action. Indeed, it is highly probable, notwithstanding the absence of direct authority, that the courts would now determine in favour of such extension, and the more so, as beyond all doubt, the rule applies to every person who claims under the original parties, or in privity with them.

§ 1689.⁴ It has already been shown, that the term *privity* § 1501 denotes mutual or successive relationship to the same rights of property; and the reason why persons standing in this relation to the litigant can rely upon, and are bound by, the proceedings to which he has been a party, is, that they are identified with him in interest.⁵ Hence all privies, whether in blood, in estate, or in law, are estopped themselves, and can estop others, from litigating that, which would be conclusive either against or in favour of him with whom they are in privity.⁶ Thus, where a general right has been fairly contested, and established against a representative class, persons included in the class represented, though not actual parties to the suit, will be still bound by

¹ *Doe v. Huddart*, 2 C. M. & R. 316; 5 Tyr. 846, S. C.; *Doe v. Seaton*, 2 C. M. & R. 728, 732; *Wright v. Doe d. Tatham*, 1 A. & E. 19; B. N. P. 232; *Doe v. Wellsman*, 2 Ex. R. 368; 6 Dowl. & L. 179, S. C.; *Armstrong v. Norton*, 2 Ir. Law R. 96; *Aslin v. Parkin*, 2 Burr. 665; *Nowlan v. Gibson*, 12 Ir. Law R. 5, 10—14; *Litchfield v. Ready*, 5 Ex. R. 939; *Matthew v. Osborne*, 13 Com. B. 919; *Doe v. Challis*, 17 Q. B. 166. See post, § 1696.

² *Hancock v. Welsh*, 1 Stark. R. 347.

³ Ante, § 756.

⁴ Gr. Ev. in part, as to first eight lines.

⁵ Ante, §§ 90, 787.

⁶ Ante, § 90.

the decision.¹ So, a verdict and judgment for or against the ancestor may be pleaded in bar, or will furnish cogent evidence, for or against the heir, the tenant in dower, the tenant by the curtesy, the legatee, the devisee, or any other person claiming under the ancestor.² So, if several successive remainders are limited in the same deed, a judgment for one remainder-man is evidence for the next in succession.³ A judgment of ouster in a *quo warranto*, against the incumbent of an office, is conclusive against those who derive their title to office under him.⁴ The conviction, too, of a former owner of lands on an indictment for non-repair of a road *ratione tenuræ*, will be cogent, if not conclusive, evidence of liability to repair, as against a subsequent purchaser of the same lands.⁵ So, an executor or administrator will be bound by a verdict recovered against the testator or intestate;⁶ a husband and wife will be found by a verdict recovered against the wife before her marriage;⁷ and the same rule will apply to all grantees, mortgagees, and assignees, provided their title has accrued *since* the judgment was pronounced.⁸

§ 1690. Where a man brought an action against several persons for diverting water from his works, and had judgment; and after-

¹ *Comm. of Sewers of London v. Gellatly*, 45 L. J., Ch. 788, per Jessel, M. R.

² *Lock v. Norborne*, 3 Mod. 141; *Outram v. Morewood*, 3 East, 346; *Whitaker v. Jackson*, 33 L. J., Ex. 181; 2 H. & C. 926, S. C.

³ *Pyke v. Crouch*, 1 Ld. Ray. 730; B. N. P. 232; *Doe v. Tyler*, 6 Bing. 390.

⁴ *R. v. May*, of York, 5 T. R. 66, 72, 76; *R. v. Hebden*, 2 Selw. N. P. 1194; 2 Str. 1109, S. C.

⁵ *R. v. Blakemore*, 2 Den. 410.

⁶ *R. v. Hebden*, Andr. 389.

⁷ *Outram v. Morewood*, 3 East, 346. But see 33 & 34 V., c. 93, § 12; and 37 & 38 V., c. 50, §§ 1 & 2. The joint operation of these two Acts is sufficiently curious, for while the former protects the husband from liability "for the debts of his wife contracted before marriage" (see *Conlon v. Moore*, I. R., 9 C. L. 190), and renders the wife responsible for such debts, provided the parties have married between the 9th of August, 1870, and the 30th of July, 1874, the latter, with respect to all marriages contracted since the last-named date, has again imposed on the husband a limited liability, in the event of his wife having brought him any fortune. See, also, now 45 & 46 V., c. 75, §§ 14, 15, as to the law with respect to parties married since 31st Dec., 1882.

⁸ *Doe v. E. of Derby*, 1 A. & E. 790, per Littledale, J.; *Doe v. Webber*, 1 A. & E. 119; *Adams v. Barnes*, 17 Mass. 365.

wards he and another sued the same defendants for a similar injury to the same works; the former judgment was held to be cogent evidence of the plaintiffs, their privity in estate with the former plaintiff being presumed by the court from the fact that they were in possession of the property.¹ In that case,—which was decided before parties to the record were rendered competent to testify,—it was objected to the admissibility of the judgment, that one of the plaintiffs had himself been a witness for the other in the former suit, when he was disinterested; but the court overruled the objection, giving the following sensible reason for their decision:—"The case being brought within the general rule, that a verdict on the matter in issue is evidence for or against parties and privies, no exception can be allowed in the particular action, on the ground that a circumstance occurs in it which forms one of the reasons why verdicts between different parties are held to be inadmissible; any more than the absence of all such circumstances in a particular case, would be allowed to form an exception to the general rule, that verdicts between other parties cannot be received. It is much wiser and more convenient for the administration of justice, to abide as much as possible by general rules."²

§ 1691. In all the instances of privity above given, the privy has § 1503 claimed, or been liable, *under or through* the original party; but the same rules of law apply, where two or more persons are subject to a *joint or concurrent* liability. For instance, if one be sued alone upon a *joint* note, debt, or tort, the judgment against him, even *without satisfaction*, may be pleaded and proved in bar of a second suit for the *same cause* of action,³ whether it be brought against the other debtor or wrong-doer, or against the joint debtors or wrong-doers; because in these cases, the original cause of action has been changed into matter of record, which is of a higher nature,

¹ *Blakemore v. Glamorg. Can. Co.*, 2 C. M. & R. 133, 139; *Strutt v. Bovingdon*, 5 Esp. 58, 59, per Ld. Ellenborough.

² 2 C. M. & R. 139, per Parke, B.

³ See *Brinsmead v. Harrison*, 40 L. J., C. P. 281; 6 Law Rep., C. P. 584, S. C.; 41 L. J., C. P. 190, per Ex. Ch., S. C.; and 7 Law Rep., C. P. 547.

and the inferior remedy is thus merged in the higher.¹ So, where a party, having concurrent, that is, joint and several remedies against several persons, has obtained judgment against one, he will certainly be estopped from proceeding against the others, if the damages have been received; and he will probably be estopped, even though the judgment has not been satisfied;² or if the law were otherwise, a plaintiff might recover damages twice over for the same cause of action, which would be repugnant to natural justice.³ So, if an action on a joint contract or trespass be brought against two defendants, one of them may possibly be allowed to plead the pendency of another action against him for the same cause;⁴ but if A. be sued on a contract, the pendency of an action against B. for the same cause cannot be pleaded, for in such case A. is not twice vexed; and his proper course, therefore, is either to plead the non-joinder of B., if B. is within the jurisdiction, or to appeal to the equitable authority of the court for a stay of proceedings.⁵

§1692. Upon a somewhat similar principle, if a judgment has been recovered, and execution executed, against a garnishee in a § 1504

¹ *King v. Hoare*, 13 M. & W. 494, 504; 2 Dowl. & L. 382, S. C.; *Kendall v. Hamilton*, L. R. 4, App. Cas. 504, per Dom. Proc.; and 48 L. J. C. P. 705; affirming S. C. L. R. 3 C. P. D. 403; and 47 L. J. C. P. 665; *Lechmere v. Fletcher*, 1 C. & M. 634, per Bayley, B.; *Brown v. Wootton*, Yelv. 67; Cro. Jac. 73; M. 762, S. C.; *Ward v. Johnson*, 13 Mass. 148. These cases overrule a dictum of Ld. Tenterden in *Watters v. Smith*, 2 B. & Ad. 892.

² *Buckland v. Johnson*, 15 Com. B. 145. See *Phillips v. Ward*, 16 Com. B., N. S. 717.

³ *Bird v. Randall*, 3 Burr. 1345, 1353; 1 W. Bl. 373, 387, S. C.; recognised in *Cooper v. Shepherd*, 3 Com. B. 272; *King v. Hoare*, 13 M. & W. 496, 505, per Parke, B.; *Lechmere v. Fletcher*, 1 C. & M. 623, 634, 635, per Bayley, B.; *U. S. v. Cushman*, 2 Summ. 426, 437—441, per Story, J.; *Farwell v. Hilliard*, 3 New Hamp. 318. See *Godson v. Smith*, 2 Moore, 157.

⁴ *E. of Bedford v. Bp. of Exeter*, Hob. 137; *Rawlinson v. Oriel*, 1 Show. 75; Carth. 96; *Henry v. Goldney*, 15 M. & W. 499, per Alderson, B. This used to be a plea in abatement, but all such pleas are now abolished. Rules of Sup. Ct., 1883, Ord. XXI., R. 20.

⁵ *Henry v. Goldney*, 15 M. & W. 494, overruling a dictum of Lord Ellenborough in *Boyce v. Douglas*, 1 Camp. 60. See *Newton v. Blunt*, 3 Com. B. 675, where two actions having been brought against two joint contractors in respect of the same demand, and the debt and costs in one action having been paid, it was held that a judge at chambers might stay the proceedings in the other action without costs.

suit of *foreign attachment*, he may rely on these facts as an estoppel, should any subsequent action be brought against him by the defendant in such suit, for the moneys paid by him to the defendant's creditor under the process of the Lord Mayor's Court;¹ and this, too, whether the debt sued for in such court accrued within its jurisdiction or not.² So, any payment made by, or execution levied upon, a garnishee under any proceeding for the attachment of debts owing or accruing from him to a judgment debtor is rendered, by the Rules of the Supreme Court, 1883, a valid discharge to the garnishee as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed.³

§ 1693. In conformity with the rule, which rejects judgments § 1505
inter partes as evidence either for or against *strangers* to prove the facts adjudicated, it has been determined that a *judgment in a criminal prosecution*,—unless admissible as evidence in the nature of reputation, or, taken in conjunction with the prosecution, as an act of ownership,⁵—cannot be received in a civil action, to establish the truth of the facts on which it was rendered;⁶ and

¹ *Magrath v. Hardy*, 4 Bing. N. C. 782, *Webb v. Hurrell*, 4 Com. B. 287; *Huxham v. Smith*, 2 Camp. 19, per Ld. Ellenborough; *Crosby v. Hetherington*, 4 M. & Gr. 933; *McDaniel v. Hughes*, 3 East, 367; *Philips v. Hunter*, 2 H. Bl. 402, 410; *Hull v. Blake*, 13 Mass. 153; *Holmes v. Remsen*, 20 Johns. 229.

² *Westoby v. Day*, 2 E. & B. 605. See *Matthey v. Wiseman*, 18 Com. B., N. S. 657.

³ Ord. XLV., R. 7. See 17 & 18 V., c. 125, § 65; which section, although repealed generally, is still applicable to the County Courts by virtue of an Order in Council of 18 Nov. 1867. See Cy. Ct. R. O. & F. of 1868, p. 234; and 46 & 47 V., c. 49, § 7. See, also, 19 & 20 V., c. 102, §§ 63—69, for corresponding clauses relative to Ireland.

⁴ See *Petrie v. Nuttall*, 18 Ex. R. 569; ante, § 624.

⁵ *Brew v. Haren*, 1 R., 9 C. L. 29; S. C. Aff. on App. I. R. 11 C. L. 198.

⁶ *Smith v. Rummens*, 1 Camp. 9; *Hathaway v. Barrow*, id. 151; both which cases are explained by Parke, B., in 2 C. M. & R. 139; *Justice v. Gosling*, 12 Com. B. 39; *Jones v. White*, 1 Str. 68, per Eyre & Pratt, Js.; B. N. P. 233; *Hillyard v. Grantham*, cited by Ld. Hardwicke in *Brownsword v. Edwards*, 2 Ves. Sen. 246; *Gibson v. McCarty*, Cas. temp. Hardw. 311; *Helsham v. Blackwood*, 11 Com. B. 111; *Wilkinson v. Gordon*, 2 Add. 152, per Sir J. Nicholl; *Jameson v. Leitch Milw.*, Ec. Ir. R. 690. See, also, 24 & 25 V., c. 96, § 86, cited ante, § 1455.

that a judgment in a civil action, or an award,¹ cannot be given in evidence for such a purpose in a criminal prosecution.² So, the record of the conviction of a principal cannot be received as any proof of his guilt on the trial of a subsequent indictment against the accessory.³ However, where a prisoner was indicted for the substantive offence of receiving stolen goods, and a witness for the Crown, after confessing that he was himself the thief, admitted on cross-examination that he had been tried and acquitted of the theft, the Irish judges held, that the acquittal of the principal, though not conclusive evidence of his innocence, was a fact which it was right to leave to the jury, together with the fact of his subsequent confession in court.⁴ Again, a verdict for or against a tenant for life, will not be evidence for or against the reversioner, because the reversioner does not claim through the tenant for life, but enjoys an independent title.⁵ So, a judgment obtained by or against a lessee, cannot, it is submitted,—notwithstanding some authorities to the contrary,⁶—be made available in a subsequent action by or against the lessor.⁷

§ 1694.⁸ It is true that a record is sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a *solemn admission* by such party in a judicial proceeding, with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because the record is admitted in this case, not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that

§ 1506

¹ R. v. Fontaine Moreau, 11 Q. B. 1028.

² See R. v. Duch. of Kingston, 20 How. St. Tr. 471, 485; *Acta facta in causâ civili non probant in causâ criminali*. Masc., de Prob., Concl. 34.

³ R. v. Turner, 1 Moo. C. C. 347; 1 Lew. C. C. 119, S. C.; R. v. Ratcliffe, 1 Lew. C. C. 122, per Parke, J.; Keable v. Payne, 8 A. & E. 560, per Patteson, J.; R. v. Smith, 1 Lea. 288. These cases do not directly establish the proposition in the text; but its soundness is clear on principle, unless a conviction be a judgment in rem, which it is submitted it is not.

⁴ R. v. M'Cue, Jebb, C. C. 120.

⁵ B. N. P. 232. See ante, §§ 757, 758.

⁶ Com. Dig., Ev. A. 5; 2 Ph. Ev. 11. The passage in Comyn seems to apply to the old action of *ejectione firmæ*.

⁷ Wenman v. Mackenzie, 5 E. & B. 447; Rees v. Walters, 3 M. & W. 527; Rushworth v. Countess of Pembroke, Hardr. 472. See ante, § 789.

⁸ Gt. Ev. § 527, a, in part.

the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs.¹ Thus, where a carrier brought trover against a person to whom he had delivered the goods intrusted to him, and which were lost, the record in this suit was held admissible for the owner in a subsequent action brought by him against the carrier, as amounting to a confession in a court of record, that he had had the plaintiff's goods.² So, a record of judgment in a criminal case, upon a *plea of guilty*, is admissible in a civil action against the party, as a solemn judicial confession of the fact.³

§ 1695. In order that a judgment should bind parties and privies, § 1507 it must have *directly decided the point* which is *in issue* in the *second action*; ⁴ and therefore, whenever it is pleaded by way of estoppel, or is offered in evidence, the opposite party is always at liberty to deny on the record, or at the trial, that it has settled the rights of the parties as to the same cause of action which is now in controversy; and the question of identity thus raised, must be determined by the Judge, or, if the facts are disputed, by the jury upon the evidence adduced. The due determination of this question will require a careful examination of the issues raised in the two actions; for while, on the one hand, it is not necessary that the actions should be in the same *form*, provided the facts in issue are really the same;⁵ so, on the other, it is not sufficient that the *writs* should be *identical*, if the issues raised by the pleadings are different.

¹ Ante, §§ 772, 783, 821.

² *Tiley v. Cowling*, 1 Ld. Ray. 744, per Holt, C. J.; B. N. P. 243, S. C.; *Robinson v. Swett*, 3 Greenl. 316.

³ Anon., per Wood, B., cited 2 Ph. Ev. 25; *R. v. Fontaine Moreau*, 11 Q. B. 1033, per Ld. Denman; *Bradley v. Bradley*, 2 Fairf. 367.

⁴ *Ricardo v. Garcias*, 12 Cl. & Fin. 368; *Bainbrigge v. Baddeley*, 2 Phill. 705, 709, 710; *Toulmin v. Copland*, id. 711; *Hunter v. Stewart*, 31 L. J., Ch. 346, 349, 350; 4 De Gex, F. & J. 168, 176—178, S. C., per Ld. Westbury; *Langmead v. Maple*, 18 B., N. S. 255; *Moss v. Anglo-Egyptian Navig. Co.*, 1 Law Rep., Ch. Ap. 108; 35 L. J., Ch. 179, S. C.; *Dolphin v. Aylward*, 15 Ir. Eq. R., N. S. 583; *Flitters v. Allfrey*, 10 Law Rep., C. P. 29; 44 L. J., C. P. 73, S. C.

⁵ *Krishna Behari Roy v. Brojeswari Chowdranee*, 2 Law Rep., Ind. Ap. 283. See, also, *Symons v. Rees*, L. R., 1 Ex. D. 416; *Priestman v. Thomas*, S. C. on app.; L. R., 9 P. D. 210; L. R., 9 P. D. 70; 53 L. J., P. D. & A. 58, S. C.

§ 1696.¹ For instance, if one wrongfully take another's horse and § 1508
sell it, applying the money to his own use, a recovery in an action of trespass by the owner for the taking, would be a bar to a subsequent action for the money received, or for the price, the cause of action being proved to be the same.² So, if two wrong-doers were jointly to convert goods to their own use by selling them, a judgment in trover recovered against one would constitute a bar to a subsequent action against the other for money had and received, even though it were capable of proof, that the proceeds of the sale had exceeded the amount of the damages awarded in the first action.³ So, a verdict for the defendant in trover, on a plea of denying the plaintiff's title to the goods, is a bar to an action for the money arising from the sale of them, because in both these actions the same question of property must necessarily arise.⁴ Again, the recovery of judgment in replevin is a bar to an action of trespass in respect to the same taking of the same goods; because, although the damages actually recovered in replevin are usually assessed at the cost of the replevin bond, no law exists to deprive the plaintiff of the right to recover special damages in that form of action.⁵ So, where a farmer, on being sued in the County Court for discharging his servant before the termination of the hiring without reasonable cause, had obtained judgment, this judgment was held to be a bar to a subsequent summons before justices against the master to recover the servant's wages; though it was urged in that case with much force, that the jurisdiction of the two courts was totally distinct, and that the claim made in the one was different from that preferred in the other.⁶ In an action for mesne profits, where the defendant in his statement relies on the non-possession of the plaintiff, the latter may reply, by way of estoppel, a judgment for the

¹ Gr. Ev. § 532, as to the first five lines.

² 17 Pick. 13, per Putnam, J.; *Young v. Black*, 7 Cranch, 565; *Livermore v. Herschell*, 3 Pick. 33. Whether parol evidence would be admissible in such case to prove that the damages awarded in trespass were given merely for the tortious taking, without including the value of the goods, to which no evidence had been offered; *quære*, and see *Loomis v. Green*, 7 Greenl. 386.

³ *Buckland v. Johnson*, 23 L. J., C. P. 204; 15 Com. 145, S. C.

⁴ *Hitchin v. Campbell*, 2 W. Bl. 827, 831, 832; 3 Wils. 304, S. C.

⁵ *Gibbs v. Cruikshank*, 8 Law Rep., C. P. 451; 42 L. J., C. P. 273, S. C.

⁶ *Routledge v. Hislop*, 29 L. J., M. C. 90; 2 E. & E. 549, S. C. But see *Hindley v. Haslam*, L. R., 3 Q. B. D. 481.

recovery of land in his favour, whether it be by verdict or by default, and whether it has been followed or not by the issue and execution of a writ of possession.¹ So a verdict for the defendant in replevin where to an avowry for rent the plaintiff had denied the tenancy, has been held to conclude the plaintiff, when subsequently sued by the party under whom he had made cognizance, for the rent which had accrued at the time of the distress.² So, where,—prior to the 10th of August, 1854, when the laws relating to usury were repealed,³—the defendant pleaded usury to an action on a bond, a verdict of acquittal in an action for penalties for usury on the same bond, between the same parties, was held to be evidence for the plaintiff.⁴

§ 1697. But, on the other hand, the recovery of damages for injury to plaintiff's carriage through defendant's negligent driving, will not bar any second action claiming compensation for personal injuries caused by the same accident; for, although the plaintiff, in such a case, may have had an opportunity of recovering in the first action the damages claimed in the second, he was not obliged to avail himself of it, but he was entitled in strict law, to discriminate between the damage done to his property, and that done to his person, and to treat each injury as a separate and distinct cause of action.⁵ So, the prior recovery of damages in an action for false imprisonment, cannot be pleaded in bar to a subsequent action for malicious prosecution, even though the jury on the first trial may have been misdirected to take into their consideration the malicious conduct of the defendant.⁶ Neither will a judgment

¹ *Wilkinson v. Kirby*, 23 L. J., C. P. 224; 15 Com. B. 430, S. C. But see *Pearse v. Coaker*, 4 Law Rep., Ex. 92; 38 L. J., Ex. 82, S. C., and *Kenna v. Nugent*, I. R., 7 C. L. 464, where the Irish Ex. Ch. held that a judgment by default in ejectment was not an estoppel, and therefore, in an action for mesne profits, was not conclusive as to the time at which the plaintiff's title accrued. Qu., therefore, as to the law stated in the text. See, also, ante, § 1688.

² *Hancock v. Welsh*, 1 Stark. R. 347.

³ 17 & 18 V., c. 90.

⁴ *Cleve v. Powel*, 1 M. & Rob. 228, per Ld. Denman. For other examples, see *Whittaker v. Jackson*, 33 L. J., Ex. 181; 2 H. & C. 926, S. C.; *Newington v. Levy*, 40 L. J., C. P. 29; 6 Law Rep., C. P. 180, S. C.

⁵ *Brunsdon v. Humphrey*, 53 L. J., Q. B. 476, per Ct. of App., reversing S. C. L. R., 11 Q. B. D. 712; 52 L. J., Q. B. 756.

⁶ *Guest v. Warren*, 23 L. J., Ex. 121; 9 Ex. R. 379, S. C.

recovered by a widow seeking compensation, under Lord Campbell's Act,¹ for the death of her husband through the negligence of the defendants, be a bar to a subsequent action brought by her, as his administratrix, to recover damages from the same defendants for an injury caused by the same accident to his personal property.² Nor, in a case of collision at sea, will a proceeding in rem in the Admiralty Division be any bar to a proceeding in personam in the Queen's Bench Division.³ A verdict, too, for the defendant in an action for detention of goods on a statement of defence setting up an authorised sale, will not prevent him from being liable to the plaintiff for the proceeds of the sale in an action for money had and received; because such a verdict must have been given on the express ground, that the defendant had sold the goods in question on the authority of the plaintiff.⁴ Again, if an action were brought for obstructing a watercourse, and the plaintiff were to obtain a verdict on a defence denying the obstruction, this would not preclude the defendant from disputing the plaintiff's right to the watercourse, should he bring a second action for a subsequent obstruction.⁵ So, if a tenant, when sued for rent, were to allow judgment to go by default, he would not thereby be estopped, in an action for subsequent rent, from pleading any justification, though such statement of defence would have barred the former claim, had it been pleaded on the first occasion.⁶

§ 1698. If to an action for trespassing on a close, whether described by abutments or name, the defendant were to rely on a statement that the spot in dispute was his own freehold, and obtain a verdict, this record would not estop the plaintiff from bringing a second action for a trespass committed on the same close; for, as

¹ 9 & 10 V., c. 93; 27 & 28 V., c. 95.

² *Barnett v. Lucas*, 1 R., 6 C. L. 247, per Ex. Ch.

³ *Nelson v. Couch*, 15 Com. B., N. S. 99; *The Bengal, Swab. Adm. R.* 468; *The John and Mary*, id. 471; *Harmer v. Bell*, 7 Moo. P. C. R. 267.

⁴ *Hitchin v. Campbell*, 2 W. Bl. 779, 832; as explained in *Buckland v. Johnson*, 15 Com. B. 161, 162.

⁵ *Evelyn v. Haynes*, per Ld. Mansfield, cited and explained by Ld. Ellenborough in *Outram v. Morewood*, 3 East, 365.

⁶ *Howlett v. Tarte*, 10 Com. B., N. S. 813; 31 L. J., C. P. 146, S. C. See, also, for another illustration, *Hall v. Levy*, 44 L. J., C. P. 89; 10 Law Rep., C. P. 154, S. C.

the defendant, to support such a statement of defence need not have proved his title to the *whole* close, but might have rested satisfied with showing that the *part* on which the trespass was committed belonged to him, the only effect of the record in a subsequent action between the same parties, or those claiming under them, would be to prove that *some* part of the close was the defendant's property; as this would not bar the plaintiff's right, unless it could be further shown; that the trespass in the two actions were committed on the same part.¹ In *R. v. Fairie*,² where the defendant was indicted for causing a nuisance by keeping up furnaces for making animal charcoal, his former conviction by justices for an offence against the Smoke Consumption Act of 1853,³ committed at the same place and in the course of the same trade, was tendered in evidence. The court, however, held, that this document could not be received, as the statutable offence was not of necessity, the doing any act, which would constitute an indictable nuisance at common law. On the other hand, a party, who has either obtained a decree for a divorce, or whose suit for that purpose has been dismissed, cannot afterwards maintain a fresh suit for mere judicial separation on the same grounds.⁴

§ 1699. It matters not in regard to the conclusive effect of a judgment, whether the plaintiff in the second action was the plaintiff or defendant in the first, provided the *point in dispute* be the same in both suits. Therefore, if an action be brought for goods sold and delivered with a warranty, or for work and labour done, or for goods supplied, under a contract, and the defendant elect to show, as he may do, how much less the subject-matter of the action was worth, by reason of a breach of the warranty or contract; he will be considered as having satisfaction for the breach, to the extent that he obtained, or was, after such election, capable of obtaining, an abatement of price on that account; and

¹ *Smith v. Royston*, 8 M. & W. 386—388, per Alderson, B. See Whittaker v. Jackson, 33 L. J., Ex. 181; 2 H. & C. 926, S. C.

² 8 E. & B. 486; 8 Cox, 66, S. C.

³ 16 & 17 V., c. 128, § 1.

⁴ *Ciocci v. Ciocci*, 29 L., Pr. & Mat. 60, per Cresswell, J. O. See *Green v. Green*, 43 L. J., Pr. & Mat. 6; 3 Law Rep., P. & D. 121, S. C.; and *Evans v. Evans & Robinson*, 27 L. J., Pr. & Mat. 57.

to that extent, but no further, he will be precluded from recovering in another action.¹ So, a verdict negating any right which a defendant sets up in his statement, will estop him from asserting that right as plaintiff in a subsequent action against his former opponent.² For instance, if to an action for a breach of contract, the defendant relies on a set-off or counterclaim, and the issue thereon is found against him, he cannot afterwards sue the plaintiff for the demand specified in that statement of defence.³

§ 1700. In applying this rule to *cross-actions*, care must be taken to distinguish between cases, where the points in issue are identical, and those, where both suits *merely relate to the same transaction or property*. In the latter case the recovery of a verdict by the plaintiff in one action will not estop the defendant from bringing a subsequent action against him. Thus, where the purchaser of a kitchen range, on being sued for the stipulated price, paid 40*l.* into court, which was accepted in satisfaction of the cause of action; it was held that he was not estopped thereby from suing the maker for negligence in the construction of the range.⁴ True, the purchaser might, if he had thought fit, have relied upon the bad workmanship of the article bought as a defence to the former action; but he was not bound to take that course, and having omitted to do so, he had a perfect right to maintain a separate action for the damage, which he had sustained on that account.⁵ Again, it frequently happens in running down cases, that both parties commence proceedings against each other; and as a verdict on the first trial is no evidence on the second,⁶ juries occasionally find verdicts in favour of both plaintiff's, in order, as it would seem, to illustrate the humiliating doctrine that no human institutions are perfect.⁷

¹ *Mondel v. Steel*, 8 M. & W. 858, 871, 872. See *Thornton v. Place*, 1 M. & Rob. 218.

² *Smith*, L. C. 666.

³ *Eastmure v. Laws*, 5 Bing. N. C. 444; 7 Scott, 461; 7 Dowl. 431, S. C. See *Stanton v. Styles*, 1 L. M. & P. 575.

⁴ *Rigge v. Burbidge*, 15 M. & W. 598; 4 Dowl. & L. 1, S. C.

⁵ *Davis v. Hedges*, 6 Law Rep., Q. B. 687; 40 L. J. Q. B. 276, S. C.

⁶ See the *Calypso*, Swab. Adm. R. 28.

⁷ In a case of collision in the old Court of Admiralty, where cross actions had been brought, Dr. Lushington,—after observing that the records of that
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§ 1701. A convenient and safe *test* for ascertaining whether or not the judgment in one action should be a bar to another, is to consider *whether the same evidence would or would not sustain both*;¹ but if the statements of claim be framed in such a manner, that the causes of action *may* be identical in the two suits, the party bringing the second action must show that they are not the same, for he has no right to leave the question of identity to be determined, on a nice investigation of the facts and pleadings.² In one case, indeed, where the plaintiff had in a former action declared upon a promissory note, and for goods sold, but, upon executing the writ of inquiry after judgment by default, he had not been prepared with evidence on the count for goods sold, and had therefore taken his damages for the amount only of the note; he was permitted, in a second action for the goods sold, to prove this fact by parol, and the first judgment was held to be no bar to the second suit.³ In another case, too, a plaintiff declared in debt for use and occupation of a farm, with the usual money counts, and in his particulars of demand he claimed a certain sum for the value of

court showed, that scarcely ever was a case of collision tried in which a true statement of facts was made on both sides,—confessed that he was unable to come to any satisfactory decision on the conflict of evidence; and as the Trinity Masters, whom he had called in, found themselves equally incapable of determining the matter, the result was that both actions were dismissed; In re Maid of Auckland, 6 Ec. & Mar. Cas. 240. The general rule of the Admiralty Division in cases of collision, when both parties are blamable in not having taken necessary precautions, is to apportion the damages equally between them: Vaux v. Sheffer, 8 Moo. P. C. R. 75; The Milan, Lush. Adm. B. 388; The Sylph, 2 Ec. & Mar. Cas. 86. This rule, however, does not apply when the collision has in part been caused by the plaintiff's non-compliance with the regulations for preventing collision made under the Merchant Shipping Acts 1854 to 1873; for by § 17 of 36 & 37 V., c. 85, the plaintiff in such case cannot maintain his suit; The James, Swab. Adm. R. 60. See ante, § 206; also, as to the present regulations, ante, § 1604, n. 2.

¹ Hitchin v. Campbell, 2 W. Bl. 831, per De Grey, C. J.; Martin v. Kennedy, 2 B. & P. 71, per Ld. Eldon; Wadsworth v. Bentley, 23 L. J., Q. B., Bail Ct. Cas., 3, per Crompton, J.; Hunter v. Stewart, 31 L. J., Ch. 350; 4 De Gex, F. & J. 178, S. C., per Ld. Westbury; Dolphin v. Aylward, 15 Ir. Eq. R. N. S. 583.

² Ld. Bagot v. Williams, 3 B. & C. 239, per Abbott, C. J.; Seddon v. Tutop, 6 T. R. 609, per Ld. Kenyon.

³ Seddon v. Tutop, 6 T. R. 607; recognised by Bayley, J., in Ld. Bagot v. Williams, 3 B. & C. 240; and by Best, C. J., in Thorpe v. Cooper, 5 Bing. 129. See Preston v. Peeke, 27 L. J., Q. B. 424; E. B. & E. 336, S. C.; cited ante, § 85.

stone taken from a quarry on the farm. At the trial he confined his evidence to the count for use and occupation, and obtained a general verdict. Before this action was tried, the plaintiff brought another against the same defendant for quarrying and taking away stone; and the court held, on the trial of the action on the case, that the tort was not waived by the plaintiff's abandonment of his claim for the value of the stone as stated in the particulars, and that, consequently, the second action was maintainable notwithstanding the former recovery.¹

§ 1702. On the other hand, it has been laid down as a general rule, which is recognised alike in all courts, that "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter, which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."² § 1513

§ 1703. Many cases in Chancery might be cited in illustration of the above rule,³ but it will suffice to refer to a few common-law decisions connected with this subject. Thus, it has been determined, that if a plaintiff obtains an interlocutory judgment for his whole claim, but afterwards, to avoid delay, attends before § 1514

¹ *Hadley v. Green*, 2 Tyr. 390. See acc. *Bridge v. Gray*, 14 Pick. 55; *Webster v. Lee*, 5 Mass. 334; *Phillips v. Berrick*, 16 Johns. 136.

² *Henderson v. Henderson*, 3 Hare, 115, per Wigram, V.-C. See, also, *Srimut Rajah v. Katama Natchiar*, 11 Moo. Ind. App. C. 50.

³ *Farquharson v. Seton*, 5 Russ. 45; *Partridge v. Usborne*, id. 195; *Chamley v. Ld. Dunsany*, 2 Sch. & Lef. 718, per Ld. Eldon; *M. of Breadalbane v. M. of Chandos*, 2 Myl. & Cr. 732, 733, per Ld. Cottenham.

the officer of the Court to have his damages assessed on one item only, and enters a *nolle prosequi* as to the others, this will bar any future action for the last mentioned items; a *nolle prosequi* as to part, entered up after judgment for the whole, being equivalent to a *retrahit*.¹ A fortiori, if a plaintiff, having declared on several causes of action, fails to establish some of them at the trial for want of evidence, he cannot bring a second action to recover damages for these last, unless he be nonsuited,² or he can induce the court to set aside the verdict he has obtained³ on the ground of mistake, surprise, or accident. So, if he sues for part only of an indivisible claim, as if one serves another for a year under the same hiring, and then brings an action for a month's wages, it is a bar to the whole.⁴ Upon the same principle, if a plaintiff, knowing that he has an unliquidated claim against a defendant for a large amount, chooses to sue him for a less sum than is due; or if, having a demand for 60*l.*, in three sums of 20*l.*, he consents at *Nisi Prius* to take a verdict for 40*l.*, he cannot afterwards bring a second action for the residue.⁵ So, if all matters in difference between two parties are referred, and one of them declines to bring before the arbitrator some claim which is included within the scope of the reference, he cannot make this claim the subject of a fresh action.⁶

§ 1704. The County Court Act, 1846,⁷ contains an important clause relative to this subject; for it enacts, in § 63, “that it shall not be lawful for any plaintiff to divide any *cause of action* for the purpose of bringing two or more suits in any of the [County]

¹ *Bowden v. Horne*, 7 Bing. 716.

² See post, § 1719. In the Cy. Cts., a nonsuit operates as a judgment upon the merits for defendant, unless the judge otherwise directs. See Ord. xvi., r. 17, of Cy. Ct. Ord., 1875, and *Poyser v. Minors*, L. R., 7 Q. B. D. 729; 50 L. J., Q. B. 555, S. C.

³ *Stafford v. Clarke*, 2 Bing. 382, per Best, C. J.

⁴ *Miller v. Covert*, 1 Wend. 487.

⁵ *Ld. Bagot v. Williams*, 3 B. & C. 235, 241.

⁶ *Smith v. Johnson*, 15 East, 213; *Dunn v. Murray*, 9 B. & C. 780, 788. See *Ravee v. Farmer*, 4 T. R. 146.

⁷ 9 & 10 V., c. 95. The Act of 14 & 15 V., c. 57, which regulates the practice in Irish Civil Bill courts, contains similar provisions in § 36.

Courts,¹ but any plaintiff, having cause of action for more than" 50l.,² "for which a plaint might be entered under this Act if not for more than" 50l.,³ "may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding" 50l.;⁴ "and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." The term "cause of action," here employed, is one of indefinite import; but the courts have fixed its meaning to a certain extent, by holding, first, that it is not limited to a cause of action on *one separate entire contract*, but that it extends to tradesmen's bills, where the dealing is intended to be continuous, and where the items are so far *connected* with each other, that if they be not paid, they form one entire demand;⁵ and next, that it does not preclude the plaintiff from bringing distinct plaints, whenever the claims are of such a nature as would justify the introduction of two or more counts in the statement of claim, if the action were brought in the High Court.⁶ In conformity with this last rule, a landlord has been allowed to sue his tenant in one plaint for rent, and in another for double value, in consequence of the premises being held over after the expiration of a notice to quit.⁷ So, the holder of a promissory note, whereby the maker has specially undertaken to pay a particular rate of interest, may as it seems, first sue for the interest, and afterwards recover the principal in a second action.⁸

§ 1705. The rule requiring an *identity* in the *points at issue*, but § 1516
allowing a *diversity in the forms* of proceeding, has hitherto been illustrated by referring to cases, where a judgment recovered in one action has, or has not, been regarded as a bar to a second action. The same doctrine, however, will be found to prevail in

¹ "These words do not, in terms, prohibit the splitting a demand, for the purpose of bringing one suit in the County Court, and another in the Superior Court;" per Maule, J., in *Vines v. Arnold*, 8 Com. B. 638.

² 13 & 14 V., c. 61, § 1.

³ *Id.*

⁴ *Id.*

⁵ In *re Aykroyd*, 1 Ex. R. 479.

⁶ *Wickham v. Lee*, 12 Q. B. 526, per Erle, J.

⁷ *Id.* 521.

⁸ *Morgan v. Rowlands*, 7 Law Rep., Q. B., per Blackburn, J.

criminal prosecutions; and therefore, although, in order to warrant a prisoner in pleading *autrefois acquit*, or *autrefois convict*, the form of the two indictments, or even the nature of the charges need not be identical, yet, unless the first indictment were one, upon which the prisoner might have been convicted by proof of the facts necessary to support the second indictment, an acquittal or conviction on the first trial will be no bar to the second.¹ Thus, if a prisoner, indicted for burglariously breaking and entering a house, and stealing therein certain goods of A., be acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house, and stealing other goods of B.² Neither will his acquittal on a charge of burglary and stealing avail him on an indictment for burglary with intent to steal.³ So, if a prisoner be indicted under § 12 of the Act of 24 & 25 V., c. 99, for unlawfully uttering counterfeit coin after a previous conviction for a like offence, and be acquitted of that felony, such acquittal cannot be pleaded in bar if he be afterwards indicted for the simple misdemeanor of uttering counterfeit coin.⁴ So, an acquittal for the larceny of goods would seem to be no bar to an indictment for obtaining the same goods under false pretences; but this point is not free from doubt, as under either of the Acts of 14 & 15 V., c. 100, § 12,⁵ or 24 & 25 V., c. 96, § 88, the prisoner might be convicted of the misdemeanor on the second indictment, though the evidence were to establish the fact that a felony had been committed.⁶

§ 1706. So, upon an indictment for the statutable felony of administering poison with intent to murder, a previous acquittal on an indictment for murder, founded on the same facts, cannot be pleaded in bar.⁷ Neither will an acquittal upon an indictment for wounding with intent to kill, protect the accused from being subsequently indicted for murder upon the death of the person

¹ *R. v. Gilmore*, 15 Cox, 85.

² Per Buller, J.⁴ delivering the opinion of all the judges in *R. v. Vandercomb*, 2 Lea. 718, 719, and overruling *Turner's case*, Kel. 30, and *Jones & Beaver's case*, Kel. 52.

³ *R. v. Vandercomb*, 2 Lea. 716—721.

⁴ *R. v. Thomas*, 13 Cox, 52,

⁵ Cited post, p. 1459, n. 2.

⁶ See *R. v. Henderson*, 2 Moo. C. C. 192, 198, 199.

⁷ *R. v. Connell*, 178, per Williams and Talfourd, Js.

assaulted.¹ So, if a prisoner be charged with rape and acquitted, he may still, should the facts warrant such a course, be indicted either for an assault with *intent* to commit that crime,² or for a common assault.³ So, where two or more persons have committed successive rapes upon the same woman, though one of them be acquitted when charged as a principal in the first degree, he may still be indicted for being present aiding and abetting the others to commit the crime.⁴ So, although a prisoner be acquitted of receiving stolen goods from A. B., knowing them to have been so feloniously stolen, he may still, as it seems, be indicted for the substantive felony of receiving stolen property with a guilty knowledge; and the record of his former acquittal will not avail him, unless it be proved that the goods, if received by him at all, were received from A. B., by whom they were taken from the original owner.⁵ So, if a bankrupt be indicted for omitting certain goods out of his schedule, his acquittal or conviction will be no bar to a second prosecution against him for omitting other goods, though as such a course of proceeding savours of oppression, it would under ordinary circumstances be discountenanced by the judge.⁶ In all these cases, and in many others of a similar nature, the prisoner could not by possibility have been legally convicted on the first indictment of the offence charged in the second; and therefore the ancient maxim of the common law, that no man shall be twice brought into jeopardy for the same crime,⁷ is in no respect contravened by the second trial.

§ 1707. On the other hand, an acquittal on an indictment charging the prisoner as a principal felon, will now⁸ be a bar to an § 1518

¹ *R. v. de Salvi*, Cent. Ct. Sess. Pap. vol. 46, p. 884, referred to in *R. v. Morris*, 36 L. J., M. C. 85; 1 Law Rep., C. C. 93, S. C.

² *R. v. Gisson*, 2 C. & Kir. 781, per Pollock, C. B. But not for an *attempt* to commit the crime. See ante, § 269, n. 8.

³ *R. v. Dungey*, 4 Fost. & Fin. 99.

⁴ See *R. v. Parry*, 7 C. & P. 836.

⁵ *R. v. Woolford*, 1 M. & Rob. 384, per Patteson, J.; *R. v. Dann*, 1 Moo. C. C. 424. But see 24 & 25 V., c. 96, § 91, which throws much doubt on this law. See, also, *R. v. Huntley*, 29 L. J., M. C. 70.

⁶ *R. v. Champneys*, 2 M. & Rob. 26, per Patteson, J.; 2 Lew. C. C. 52, S. C.

⁷ See *R. v. Murphy*, 28 L. J., P. C. 53.

⁸ The law was formerly otherwise. See *R. v. Birchenough*, 1 Moo. C. C. 447; S. C. nom. *R. v. Plant*, 7 C. & P. 575.

indictment against him as an accessory before the fact, because, under an Act passed in 1861,¹ "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." Again, no person tried for any misdemeanor is liable, unless the jury have been discharged from giving a verdict, to be afterwards prosecuted for felony on the same facts,² because, as stated in a former section,³ he may be convicted of the misdemeanor, though a felony be proved. For a similar reason, no person tried for obtaining by any false pretence any chattel, money, or valuable security, is liable to be afterwards prosecuted for larceny upon the same facts.⁴ So, also, no person tried for embezzlement, or fraudulent application or disposition, as a clerk or servant, or as a person employed in either of those capacities, or as a person employed in the public service, or in the police, or as a partner, or a joint beneficial owner,⁵ can be afterwards indicted for larceny upon the same facts, and no person tried for larceny is liable to a second

¹ 24 & 25 V., c. 94, § 1.

² 14 & 15 V., c. 100, § 12, enacts, that, "If upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor." In *R. v. Shott*, 3 C. & Kir. 206, where a prisoner was indicted for the misdemeanor of carnally knowing a girl between the ages of ten and twelve, and it turned out at the trial that the girl was under ten, and that consequently a felony had been committed, Maule, J., is reported to have held that the above section did not apply, and that the prisoner was entitled to an acquittal. According to his lordship's view, "the section only applies to cases of *merger*; *e. g.*, the case of false pretences, where the facts prove that the false pretences have been effected by a forgery." *Sed quare*, as this seems to be a very unwarrantable limitation of the language of the Legislature. The proper course in such a case would appear to be, to discharge the jury from giving any verdict upon the trial for the misdemeanor, and to direct a fresh bill to be preferred for felony.

³ Ante, § 1705, ad fin.

⁴ 24 & 25 V., c. 96, § 88.

⁵ 30 & 31 V., c. 116, § 1; *R. v. Rudge*, 13 Cox, 17.

prosecution for embezzlement, or for fraudulent application or disposition.¹

§ 1708. So, if a prisoner be indicted for a compound crime, and § 1518
be wholly acquitted, he cannot be afterwards charged with any offence included in such crime; because, in these cases, the prisoner, though acquitted of the more serious charge, might still, on the first indictment, have been found guilty of the lighter offence. For instance, if one has been acquitted on an indictment for murder, he is protected against a second prosecution for manslaughter;² and, indeed, if a party be charged with any felony or misdemeanor, and be wholly acquitted, he cannot be subsequently indicted for an attempt to commit the same crime, since, on the first indictment, the jury may now acquit of the felony or misdemeanor charged, and find a verdict of guilty of the attempt, if the evidence shall warrant such finding.³ Again, an acquittal on a charge of administering poison, so as to endanger life, or to inflict grievous bodily harm, is a bar to an indictment for administering poison with intent to injure, aggrieve, or annoy any one.⁴ So, if a person be indicted for robbery, for stealing in a dwelling house, for burglary in breaking into a house and stealing goods, for larceny as a servant,⁵ or for stealing from the person, and be generally acquitted, the acquittal will be a bar to any future indictment for the simple larceny;⁶ and if a man be tried for robbery, he will also be protected from any second prosecution for assaulting with intent to rob.⁷

§ 1709. It seems, too, that the converse of this rule holds § 1519
good; and, therefore, if the prisoner be acquitted or convicted of manslaughter, or of simple larceny, he cannot in the first event be afterwards indicted for the murder of the same person,⁸ or in

¹ 24 & 25 V., c. 96, § 72. For other illustrations of this rule, see "The Corrupt and Illegal Practices Prevention Act, 1883," 46 and 47 V., c. 51, § 52.

² 2 Hale, 246.

³ 14 & 15 V., c. 100, § 9, cited ante, § 269. See, also, 14 & 15 V., c. 19, § 5; also *R. v. Miller*, 14 Cox, 356.

⁴ 24 & 25 V., c. 100, § 25.

⁵ *R. v. Jennings*, Dear. & Bell, 447.

⁶ See 1 Russ. C. & M. 837, 838, n. by Mr. Greaves. See *R. v. Compton*, 3 C. & P. 418.

⁷ 24 & 25 V., c. 96, § 41. See *R. v. Mitchell*, 2 Den. 468.

⁸ 2 Hale, 246; *Holcroft's case*, 4 Rep. 46 b; *Fost. C. L.* 326. See *R. v. Tancock*, 13 Cox. 217.

the second event, be indicted for compound larceny with respect to the same property.¹ If, therefore, through a mistake on the part of the prosecutor, or through the ignorance or inattention of the officer of the court, a bill be preferred for manslaughter or larceny, and it should come out in evidence, that the offence amounted to a murder in the one case, or to robbery, burglary, stealing in a dwelling-house, or stealing from the person, in the other, the judge should by no means direct the jury to acquit; but if the circumstances be of an aggravated nature, he should discharge the jury of that indictment, and order a fresh one to be preferred.²

§ 1710. The doctrine just explained has, on several occasions, § 1519A been recognised and adopted by the Legislature. Thus a summary conviction in respect of *any offence* punishable in that mode under either of the Acts of 1861, relating to larcenies, or to malicious injuries to property,³ or under "The Seamen's Clothing Act, 1869,"⁴ is, in itself, a bar to any other proceeding for the same cause. So, where any person, who has been charged before justices with a common assault, or with an aggravated assault on a woman or child, has either obtained a certificate of dismissal, or been summarily convicted, he is released "from all further or other proceedings, civil or criminal, for the same cause."⁵ The word "cause" here used is sufficiently ambiguous, as it may mean either "act" or "charge," and its legal effect will materially vary according to which of these two interpretations shall prevail. Hitherto the matter has not been reasoned out by the lawyers in a very satisfactory way, but a divided court has determined thus much, that, in spite of the Act, a summary conviction for assault is no bar to an indictment for manslaughter, when the party assaulted has subsequently died from the effects of the blows.⁶ On the other

¹ *R. v. Berigan*, Ir. Cir. R. 177, 184—186, per Crampton, J.; id. 195, n.

² See *Fost. C. L.* 327, 328.

³ 24 & 25 V., c. 96, § 109; 24 & 25 V., c. 97, § 67.

⁴ 32 & 33 V., c. 57, § 6.

⁵ 24 & 25 V., c. 100, § 45. See ante, § 1616.

⁶ *R. v. Morris*, 1 Law Rep., C. C. 90; 36 L. J., M. C. 84, S. C., per Martin, B., and Byles, Keating, and Shee, Js., Kelly, C. B., diss.

hand, it has been held more than once, that a man who has been either acquitted or convicted before justices of an assault, could not afterwards be indicted for felonious wounding in the same transaction.¹ So, also, when a person has been convicted of a common assault on a married woman and has paid the penalty imposed, he cannot afterwards be sued by the husband of the woman for the loss which he, as such husband, has sustained by the assault on his wife.² So, if a magistrate, on hearing a summons against a cabman for furious driving, were to award compensation to the party aggrieved, such party would be barred from bringing any subsequent action in respect of any injury sustained by him, either against the cabman or his employer, unless, indeed, he had, from the first, refused to submit himself to the magistrate's jurisdiction.³ Whatever construction may be ultimately put upon the enactment, it should be remembered that a conviction, to satisfy the statute, must be followed by fine or imprisonment, and be proved by the record or an examined copy.⁴

§ 1711. Having thus pointed out the distinction which exists § 1520 between the admissibility and effect of judgments in rem and of judgments inter partes, it will be expedient to refer shortly to some rules which govern equally both classes of instruments. And first, it is laid down as an unquestionable rule of law, that neither a judgment in rem, nor a judgment inter partes, is *evidence of any matter which may or may not have been controverted*, or which came *collaterally* in question, or which was *incidentally cognizable*, or which can only be *inferred by argument* from the judgment.⁵ For instance, on an appeal against an order of removal, where the respondents relied on a derivative settlement from the pauper's

¹ *R. v. Walker*, 2 M. & Rob. 446; *R. v. Stanton*, 5 Cox, 324, *R. v. Ebrington*, 1 B. & S. 688; 31 L. J., M. C. 14; 9 Cox, 86, S. C. See, also, *Wemyss v. Hopkins*, 44 L. J., M. C. 101; 10 Law Rep., Q. B. 378, S. C.

² *Masper & Wife v. Brown*, 45 L. J., C. P. 203; L. R., 1 C. P. D. 97, S. C.

³ *Wright v. Lond. Omnibus Co.*, 46 L. J., Q. B. 429; L. R., 2 Q. B. D. 271, S. C.; 6 & 7 V., c. 86, § 28.

⁴ *Hartley v. Hindmarsh*, 1 Law Rep., C. P. 553; 35 L. J., M. C. 255; and 1 H. & R. 607, S. C.

⁵ *R. v. Duch. of Kingston*, 20 How. St. Tr. 538; 2 Smith, L. C. 642, S. C. See *R. v. Hutchins*, L. R., 6 Q. B. D. 300; 50 L. J., M. C. 35, S. C., per Ct. of App.

father, they were not allowed to put in a previous order for the removal of the pauper's brother to the appellant parish, together with the examinations on which it was founded, though these examinations clearly proved that the brother's settlement was derived from the father.¹ The order in this case for removing the brother was silent as to the ground of removal, and the court held that the examinations, being no part of the record, could not be used to prove the particular species of settlement on which it rested.²

§ 1712. So, where an action of trover was brought against the administrator of a woman by a man who claimed to be her widower, and the defendant relied on the letters of administration, insisting that they could not have been granted to him but upon the supposition that the plaintiff and the intestate had never been married, the court held, that, inasmuch as that question had never been put in issue and decided in the Ecclesiastical Court, they were not at liberty to infer, from the grant of administration, that the parties were unmarried.³ So, the probate of a will, purporting to have been made by a married woman in pursuance of a power, furnishes no evidence whatever that the power has been duly executed; because the Probate Division has simply to determine on the validity of the instrument as an ordinary will of an ordinary person, and in case no valid objection can be taken to it, when regarded in this light, it is incumbent on the court to grant probate, and to leave the question respecting the due execution of the power to be decided by the Chancery Division.⁴ So, where to debt on bond the defendant,—before usury was legalised,⁵—had pleaded a usurious agreement between the plaintiff and himself, and had averred that the bond was given in pursuance thereof; and issue having been

¹ *R. v. Sow*, 4 Q. B. 93; *R. v. Knaptoft*, 2 B. & C. 883; explained in *R. v. Hartington Middle Quarter*, 4 E. & B. 795, 796.

² 4 Q. B. 98. See ante, § 809, ad fin.

³ *Blackham's case*, 1 Salk. 290, 291, per Ld. Holt; cited and explained by Ld. Lyndhurst in *Barrs v. Jackson*, 1 Phill. 588, 589.

⁴ *Barnes v. Vincent*, 5 Moo. P. C. R. 201; *Chatelain v. Pontigny*, 1 Swab. & Trist. 411; *Parkinson v. Townsend*, 44 L. J., Pr. & Mat. 32. See *Ward v. Ward*, 11 Beav. 377; *Noble v. Willock & Phelps*, 40 L. J., Pr. & Mat. 60, 2 Law Rep., P. & D. 276, S. C., nom. *Noble v. Phelps & Willock*; *Re Eliz. Graham*, 41 L. J., Pr. & Mat. 46.

⁵ 17 & 18 V., c. 90.

joined on a traverse of this latter averment, the defendant had a verdict; the court held that, in a subsequent action on a collateral security for the same debt, the plaintiff was not estopped by the former judgment from disproving the usurious agreement, inasmuch as the existence of such agreement had not been directly in issue in the action on the bond.¹

§ 1713. In the next place, no doubt can be entertained that § 1522 wherever a judgment is offered in evidence against a *stranger*, he may avoid its effects, by furnishing distinct proof that it was obtained by *fraud* or *collusion*. To borrow the language of Lord Chief Justice De Grey, "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal."² In applying this rule it matters not whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment, which can be clearly shown to have been obtained by manifest fraud.³ *Fabula, non judicium, hoc est; in scenâ, non in foro, res agitur.*⁴ Whether an *innocent party* would be allowed to prove in one court that a judgment against him in another court was obtained by fraud, is a question not equally clear, as it would be in *his* power to apply directly to the court which pronounced the judgment to vacate it;⁵ but, however this point may be ultimately determined, thus much is evident, that a *guilty party* would not be permitted to defeat a judgment, by showing

¹ *Carter v. James*, 13 M. & W. 137.

² *R. v. Duch. of Kingston*, 20 How. St. Tr. 544; 2 Smith, L. C. 650; *Brownsword v. Edwards*, 2 Ves. Sen, 246, per Ld. Hardwicke; *Philipson v. Ld. Egremont*, 6 Q. B. 605, per Ld. Denman; *Meddowcroft v. Huquenin*, 4 Moo. P. C. R. 386; *Perry v. Meddowcroft*, 10 Beav. 122; *Harrison v. Corp. of Southampton*, 4 De Gex, M. & G. 137; *Ochsenbein v. Papelier*, 8 Law Rep., Ch. App. 695; 42 L. J., Ch. 861, S. C.

³ *Shedden v. Patrick*, 1 Macq. Sc. Cas. H. of L. 535. See *Eyre v. Smith*, L. R., 2 C. P. D. 435, per Ct. of App.

⁴ Per Wedderburn, S. G., in *R. v. Duch. of Kingston*, 20 How. St. Tr. 479; cited by Ld. Cranworth in *Shedden v. Patrick*, 1 Macq. Sc. Cas. H. of L. 608.

⁵ *Prudham v. Phillips*, 2 Ambl. 763; 20 How. St. Tr. 479, 480, n. S. C.; *R. v. Duch. of Kingston*, 20 How. St. Tr. 544; *Shedden v. Patrick*, 1 Macq. Sc. Cas. H. of L. 535. See *Ex p. White v. Tommey*, 4 H. of L. Cas. 313.

that, in obtaining it, he had practised an imposition on the court; for it would be an outrage to justice and common sense, if a person could thus avoid the consequences of his own fraudulent conduct.¹

§ 1714. Again, every species of judgment will be rendered inadmissible in evidence, by showing that the court from which it emanated had no *jurisdiction*.² For instance, if, before the 11th of January, 1858,³ an executor or administrator had sued on a probate or letters of administration granted by a diocesan, the defendant might have defeated his title, by pleading and proving that the testator, or intestate, had bona notabilia in other dioceses within the same province; because, under the old law, the metropolitan, and not the diocesan, would, in such a case, have had jurisdiction to grant probate or administration.⁴ This law is here referred to for the purpose of pointing out that it no longer exists, the Probate Acts of 1857 for England and Ireland having respectively enacted,⁵ that all grants of probate and administrations made before the 11th of January, 1858, which may be void or voidable by reason only that the courts from which they were obtained had not jurisdiction to make them, shall be as valid as if they had been made by courts having jurisdiction. Again, a probate or letters of administration may still be defeated by proving that the supposed testator or intestate is alive; for, in this event, the Probate Division can have had no jurisdiction, nor its sentence any effect.⁶ So, if a

¹ *Prudham v. Phillips*, 2 Ambl. 763; 20 How. St. Tr. 479, 480, n. S. C. See *Doe v. Roberts*, 2 B. & A. 367; *Bessey v. Windham*, 6 Q. B. 166.

² *R. v. Bp. of Chester*, 1 W. Bl. 25, per Lee, C. J., as to sentences of visitors; *R. v. Washbrook*, 4 B. & C. 732, as to awards by public commissioners; *Mann v. Owen*, 9 B. & C. 595, as to sentences of Courts-Martial. See, also, *Briscoe v. Stephens*, 2 Bing. 213; 9 Moore, 413, S. C.; *Abp. of Dublin v. Ld. Trimleston*, 12 Ir. Eq. R. 251, 267, 268; and *Linnell & Walker v. Gunn*, 1 Law Rep., Adm. & Ecc. 363.

³ When the Probate Acts of 1857, for England and Ireland, came into operation.

⁴ *Marriot v. Marriot*, 1 Str. 671; *Stokes v. Bate*, 5 B. & C. 491; 3 D. & R. 247, S. C.; B. N. P. 247. See, also, *Huthwaite v. Phaire*, 1 M. & Gr. 159; *Whyte v. Rose*, 3 Q. B. 493; *Easton v. Carter*, 5 Ex. R. 8.

⁵ 20 & 21 V., c. 77, § 86; 20 & 21 V., c. 79, § 91, Ir.

⁶ *Allen v. Dundas*, 3 T. R. 129, 130, per Ashhurst and Buller, Js.

prisoner was tried before the Quarter Sessions, on a day to which the court had not been duly adjourned,¹ or for an offence which the justices or recorders are by statute restrained from trying,² his acquittal or conviction would be no bar to a future indictment for the same offence, because the former proceedings, being *coram non judice*, would be a mere nullity.

¹ *R. v. Bowman*, 6 C. & P. 337.

² These crimes are treason, murder, capital felony, or any felony, which when committed by a person not previously convicted of felony, is punishable by penal servitude for life; or any of the following offences:—

1. Misprision of treason;
2. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament;
3. Offences subject to the penalties of *præmunire*;
4. Blasphemy, and offences against religion;
5. Administering or taking unlawful oaths;
6. Perjury and subornation of perjury;
7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor;
8. Forgery;
9. Offences against "The False Personation Act, 1874," 37 & 38 V., c. 36 (a);
10. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern;
11. Bigamy; and offences against the laws relating to marriage;
12. Abduction of women and girls;
13. Endeavouring to conceal the birth of a child;
14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels;
15. Bribery, or undue influence;
16. Unlawful combinations and conspiracies, or combinations to commit any offence, which such justices or recorder respectively have or has jurisdiction to try when committed by one person;
17. Stealing, or fraudulently taking, or injuring, or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein;
18. Stealing, or fraudulently destroying or concealing, wills, or testamentary papers, or any document or written instrument being, or containing evidence of, the title to any real estate, or interest in lands, tenements or hereditaments;
19. Any misdemeanor against any section of the Larceny Act of 1861, which relates to frauds committed by bankers, factors, trustees, directors, solicitors, or other agents. See 5 & 6 V., c. 38; 17 & 18 V., c. 102, § 10; 20 & 21 V., c. 3; 24 & 25 V., c. 96, § 87; 32 & 33 V., c. 62, § 20; 37 & 38 V., c. 96.

(a). See "The Army Act, 1881," 44 & 45 V., c. 58, § 142, subs. 3.

§ 1715. Questions of jurisdiction most frequently arise with regard to the summary convictions by magistrates, orders of justices, inquisitions found by sheriff's juries, and other judicial proceedings of inferior tribunals; and here, —although, as already explained,¹ an adjudication of this kind cannot be impeached by disproving the facts stated in it, not excepting those which are necessary to give jurisdiction,—yet still, the parties against whom it is offered in evidence may establish its invalidity, either by proving any extrinsic facts, which show that the person or court pronouncing it had no authority to enter into the inquiry,² or by pointing out the circumstance, that the adjudication itself does not disclose facts sufficient to give jurisdiction.³ Thus, if justices have acted in a matter not regularly before them, as if they should have proceeded to remove a pauper without any complaint being made by the parish officers, this may be shown by evidence, and will be fatal to their order.⁴ So, where a justice had convicted a baker by four separate convictions of selling bread upon the same Sunday, and an action of trespass was brought against him, the court held that he could not rely upon the convictions as a defence, since he had exceeded his authority in imposing more than one penalty for the same day, and, therefore, three of the convictions were of necessity void.⁵ The rule which renders it necessary that the order, on its face, should contain a statement of all facts which are requisite to show jurisdiction, is not confined to orders of justices; but whenever a *special statutory power is exercised*, whether the order be made by a magistrate or by the Lord Chancellor, the facts which gave the authority must be stated.⁶

¹ Ante, §§ 1669—1672.

² *R. v. Bolton*, 1 Q. B. 66; *R. v. Somersetshire Js.*, 5 B. & C. 816; cited by Patteson, J., in *re Clarke*, 2 Q. B. 634, 635.

³ In *re Clarke*, 2 Q. B. 634, per Patteson, J.; ante, § 147. See *Ayrton v. Abbott*, 14 Q. B. 1; *Branwell v. Penneck*, 7 B. & C. 536; *Ex p. Bailey and Ex p. Collier*, 3 E. & B. 607; 23 L. J., M. C. 161, S. C.; *R. v. St. George, Bloomsbury*, 4 E. & B. 520; *Staverton v. Ashburton*, id. 526.

⁴ *R. v. Buckinghamshire Js.*, 3 Q. B. 807, per Ld. Denman, explaining *R. v. Bolton*, 1 Q. B. 66; *Welch v. Nash*, 8 East, 394.

⁵ *Crepps v. Durden*, 2 Cowp. 640; 1 Smith, L. C. 649, S. C.; recognised by *Dallas, C. J.*, in *Brittain v. Kinnaird*, 1 B. & B. 430.

⁶ *Christie v. Unwin*, 11 A. & E. 373, 378, 379, per Ld. Denman, and Coleridge, J.

§ 1716. It may be here convenient to furnish a few instances, § 1527
 in which the judicial proceedings of inferior tribunals have been
 quashed or otherwise treated as nullities, on the ground that they
 did not set forth sufficient facts to show jurisdiction. In *R. v.*
*Hulcott*¹ an order of justices discharging a servant from her service
 was held bad, because it did not state that she was a servant in
 husbandry; this being a fact upon which their jurisdiction de-
 pended, and which it was their duty to ascertain. In *Kite & Lane's*
*case*² a conviction was quashed, on an objection that it did not
 show that the justices were of that district, to the justices of which
 alone the Act gave jurisdiction. So, where the jurisdiction of the
 magistrate to take the examination of a soldier depended, under
 an old Mutiny Act, upon the fact of his being quartered at South-
 ampton; the circumstance that this fact, which the magistrates
 were bound to have ascertained, was neither stated in the examina-
 tion, nor proved aliundè, rendered the examination inadmissible in
 evidence.³ In *Day v. King*,⁴ the facts that the applicant was a
 member of a friendly society, that he was entitled to the money,
 and that the party against whom the application was made was an
 officer of the society, were held not only to be necessary to give the
 justices jurisdiction, but to form part of what they had to decide;
 and as these facts were not mentioned in the order, it was deemed
 deficient. So, inquisitions have on several occasions been quashed,
 where it was the duty of the sheriff, or the trustees, before whom
 they were to be taken, to give certain preliminary notices to the
 parties interested, and such notices did not appear on the face of
 the proceedings to have been given.⁵

§ 1717. It will be observed, that, in all the cases just cited, the § 1528
 facts, averments of which were omitted on the face of the pro-
 ceedings, were preliminary matters *cognizable by the authority*
 whence the proceedings emanated; and had not this been the case,

¹ 6 T. R. 583.² 1 B. & C. 101.³ *R. v. All Saints, Southampton*, 7 B. & C. 785.⁴ 5 A. & E. 359.

⁵ *R. v. May. of Liverpool*, 4 Burr. 2244; *R. v. Bagshaw*, 7 T. R. 363; *R. v. Norwich Road Trustees*, 5 A. & E. 563. See, also, *R. v. Worcestershire Js.*, 3 E. & B. 477, though that case would seem to be overruled by *R. v. Hervey*, 44 L. J., M. C. 1; 10 Law Rep., Q. B. 46, S. C. nom. *R. v. Harvey*.

it would seem that no objection on the ground of their omission could have prevailed. At least, this doctrine has been sanctioned, if not established, by Lord Chancellor Cottenham, who, in *Taylor v. Clemson*,¹ intimated a tolerably clear opinion that it could not be necessary in any case that the proceedings of inferior tribunals should contain averments of any facts, into which those tribunals had no authority to inquire, and of which, therefore, they could have no judicial knowledge.²

§ 1718. The case of *Taylor v. Clemson*³ is further important, as § 1527 distinctly deciding, that no judicial proceeding of an inferior tribunal shall be deemed defective, for not stating facts that are *necessarily implied* from those which are alleged. In that case the circumstances were as follows :—A Railway Act directed that if any landowner should not agree with the company as to the purchase money, or should refuse to accept the sum offered by the company, or should, after notice, neglect to treat, or should not agree with the company for the sale of his interest, the company might issue a warrant to the sheriff to summon a compensation jury. A warrant was issued, purporting to be under the Act, a jury was summoned, and an inquisition recorded, which last purported to be taken “pursuant to the Act, on the oaths of jurors, duly impanelled in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid, &c.” Neither the warrant nor the inquisition stated that the owner had neglected to treat, or had had notice served on him, or had not agreed to sell; and it was consequently contended that these omissions were fatal to the proceedings; but the House of Lords, affirming a decision of the Exchequer Chamber,⁴ held that the warrant and inquisition stated sufficient facts to show the jurisdiction of the sheriff and jury; for the impanelling a jury and the assessment by them, being facts inconsistent with an agreement between the company and the landowner, necessarily implied non-agreement.

¹ 11 Cl. & Fin. 647—651, questioning a contrary doctrine suggested by *Ld. Mansfield* in *R. v. Croke*, 1 Cowp. 30, and by *Ld. Denman* in *R. v. South Holland Drainage*, 8 A. & E. 437.

² See, also, *Ostler v. Cooke*, 13 Q. B. 143.

³ 11 Cl. & Fin. 610.

⁴ 2 Q. B. 978.

§ 1719.¹ Again, it is only where the point in issue in the first suit, or other legal proceeding, has been actually *determined*, that the judgment delivered therein is a bar to a subsequent action. Therefore, if the action has been discontinued or withdrawn,² or has ended in a judgment of nonsuit, either prior to the 2nd Nov. 1875,³ or since the 23rd Oct. 1883,⁴ or, if, between those dates, the plaintiff has been nonsuited with the special leave of the court to proceed again,⁵ or, if the action has been dismissed for want of prosecution under Order XXXVI., r. 12 of the Rules of the Supreme Court, 1883,⁶ or if for any other cause⁷ no final judgment of the court has been pronounced upon the matter in issue, the proceedings are not conclusive.⁸ Though the withdrawal of a juror, or the discharge of a jury, by consent, would seem to constitute no legal defence to a second action,⁹ it is so far regarded as putting a final end to the litigation, that, if the plaintiff were to sue again for the same cause, the court, on the application of the defendant, would stay the proceedings, and make the plaintiff pay the costs incurred.¹⁰ Further, a judgment is inconclusive if it appears that the decision did not turn *upon the merits*;¹¹ as, for instance, if the

¹ Gr. Ev. §§ 529, 530, in some part.

² Rules of Sup. Ct., 1883, Ord. XXVI., R. I; 3 Bl. Com. 296.

³ When the Judicature Acts came into operation. See 3 Bl. Com. 296, 376, 377; *R. v. St. Anne*, Westminster, 2 Sess. Cas. 529, per Ld. Denman; 9 Q. B. 884, S. C.; *Greely v. Smith*, 1 Woodb. & M. 181; *Bevan v. Bevan*, 29 L. J., Pr. & Mat. 45.

⁴ The Rules of 1883 came into operation on the 24th of Oct. in that year.

⁵ Rules of Sup. Ct., 1875, Ord. XLI., R. 6, which provided, that any judgment of nonsuit, unless the court or judge otherwise directed, should have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, a judgment of nonsuit might be set aside on such terms as to the court or judge should seem just. This rule has been tacitly ignored in the new Rules of 1883, so that the old practice once more prevails. See ante, § 1703, n. 2, as to the practice in the Cy. Cts.

⁶ *Re Orrell Colliery Co.*, 48 L. J., Ch. 655, per Jessel, M. R.; *Joly v. Swift*, 11 Ir. Eq. R. 410.

⁷ See *Langmead v. Maple*, 18 Com. B., N. S. 255.

⁸ *Knox v. Waldoborough*, 5 Greenl. 185; *Hull v. Blake*, 13 Mass. 155; *Sweigart v. Berk*, 8 Serg. & R. 305; *Bridge v. Sumner*, 1 Pick. 371.

⁹ *Sanderson v. Nestor*, Ry. & M. 402; *Everett v. Youells*, 3 B. & Ad. 349.

¹⁰ *Gibbs v. Ralph*, 14 M. & W. 804.

¹¹ See *Gillespie v. Russel*, 3 Macq. Sc. Cas. H. of L. 757; *Commis. of Leith Harbour & Docks v. Inspector of Poor*, 1 Law Rep., H. L. Sc. 17.

trial went off on a technical defect,¹ or for faults in the pleadings,² or because the action was misconceived,³ or because the debt was not then due,⁴ or because of a temporary disability of the plaintiff to sue,⁵ or the like.

§ 1720. In some cases it may be difficult to determine what constitutes a decision upon the merits, and this question has frequently been before the Court of Queen's Bench, in cases where *appeals against orders of removals* have been allowed by the Sessions.⁶ Thus much, however, is clear with respect to this particular class of cases, that if the order has been quashed for informality,⁷ or because the pauper was not chargeable⁸ or removable⁹ at the time when it was made, the allowance of the appeal will not preclude the respondent parish from obtaining a second order of removal; and if it does not appear on the face of the former proceedings, that the order of justices was quashed "not on the merits," parol evidence will be admissible to explain the particular ground upon which it was quashed;¹⁰ although in the absence of such evidence, the court will presume, that the order of Sessions for quashing it was an adjudication upon the settlement.¹¹ If the Sessions, in quashing an order of removal, make an entry that it is quashed "not on the merits," this will conclusively prevent the order of Sessions from operating as an estoppel between the

¹ Lepping v. Kedgewin, 1 Mod. 207; Lane v. Harrison, 6 Munf. 573; M'Donald v. Rainor, 8 Johns. 442.

² Hitchin v. Campbell, 2 W. Bl. 831, per De Grey, C. J. ³ Id.

⁴ New Eng. Bank v. Lewis, 8 Pick. 113.

⁵ Dixon v. Sinclear, 4 Verm. 354.

⁶ See R. v. Lancashire, 3 Q. B. 367; R. v. Evenwood Barony, id. 370; R. v. Charlbury, id. 378; R. v. Kingsclere, id. 388; R. v. Perrenzabuloe, id. 400; Ex p. Pontefract, id. 391; Ex p. Ackworth, id. 397; R. v. Clint, 11 A. & E. 624; R. v. St. Mary, Lambeth, 7 Q. B. 587; 2 Sess. Cas. 36, S. C.; R. v. Ellel, 7 Q. B. 593; 3 Sess. Cas. 39, S. C.

⁷ R. v. Penge, Nolan's Rep. 176; R. v. Cottingham, 2 A. & E. 250; R. v. Great Bolton, 7 Q. B. 387.

⁸ Osgathorpe v. Diseworth, 2 Str. 1256; Burr. S. C. 261, S. C.; R. v. Wheelock, 5 B. & C. 511.

⁹ R. v. Wick St. Lawrence, 5 B. & Ad. 526.

¹⁰ R. v. Wheelock, 5 B. & C. 511; R. v. Wick St. Lawrence, 5 B. & Ad. 526; R. v. Widecombe in the Moor, 2 Sess. Cas. 539; 9 Q. B. 894, S. C.; R. v. Leeds, 9 Q. B. 910; R. v. Macclesfield, 13 B. 881.

¹¹ R. v. Wick St. Lawrence, 5 B. & Ad. 535, per Parke, J.; R. v. Yeoveley, 8 A. & E. 806, 818, per Ld. Denman.

parishes; and, consequently, on the hearing of an appeal against a subsequent order respecting the same settlement, the appellants will not be allowed to show that the former order was, in fact, quashed on the merits.¹ The mere dismissal of an application made to justices out of Sessions is seldom, if ever,—unless the case be governed by some special statute,²—regarded as a final adjudication, so as to operate as a bar to further inquiry.³

§ 1721. It seems almost needless to observe, that a party, against whom a judgment is offered in evidence, may always defeat its effect by showing that it has been *reversed*.⁴ This rule applies to all courts alike, and therefore the title of an executor or administrator may be successfully disputed, by proof that the probate or letters have been revoked.⁵ So, if a prisoner has been found guilty upon an indictment, which, on a case reserved for the judges, has been pronounced bad in law, he may again be put upon his trial for the same offence, because he has never yet been in real jeopardy.⁶ It is not equally obvious, though the law on the subject is now settled, that the *pendency of proceedings in error* or an appeal will not prevent the judgment from operating as a bar.⁷ It follows à fortiori from this rule, that no objection can be taken to the binding effect of a judgment as evidence, on the ground that the statement of claim is so defective, that it would have been adjudged bad had the point of law been raised by the pleading.⁸

§ 1722. In some few cases the *effect of a judgment will materially vary*, according as it has been pronounced *in favour of the one or the other party*. Thus, while an order of Sessions confirming an order of removal is conclusive against all the world, that the pauper, at

¹ R. v. St. Anne, Westminster, 2 Sess. Cas. 525; 9 Q. B. 878, S. C.

² As to the effect of a dismissal of an information by a court dealing summarily with an indictable offence, see ante, § 1615.

³ R. v. Machen, 14 Q. B. 74; R. v. Hutchins, L. R., 6 Q. B. D. 300; 50 L. J., M. C. 35, S. C. per Ct. of App. See post, § 1757.

⁴ 2 Smith, L. C. 659; Hynde's case, 4 Rep. 71, b. cited in Doe v. Wright, 10 A. & E. 775; Nowlan v. Gibson, 12 Ir. Law R. 5; R. v. Drury, 3 C. & Kir. 193; Wood v. Jackson, 8 Wend. 9. ⁵ B. N. P. 247.

⁶ R. v. Reader, 4 C. & P. 245; cited in R. v. Bowman, 6 C. & P. 342.

⁷ Doe v. Wright, 10 A. & E. 763, 783; 1 P. & D. 673, S. C.; Munroe v. Pilkington, 31 L. J., Q. B. 81; 2 B. & S. 11, S. C., nom. Scott v. Pilkington.

⁸ Hughes v. Blake, 1 Mason, 515, 519, per Story, J.

the date of the first order, was settled in the parish to which he was sent, an order of Sessions quashing an order of removal is conclusive between the contending parties alone, and that, too, only as to the point which it decides, namely, that at the time when the order of removal was made, the appellant parish was not bound to receive the pauper.¹ Again, if the inhabitants of a parish be indicted for the non-repair of a road, and be convicted, this will furnish conclusive evidence of their liability to do the repairs, in the event of a subsequent indictment being brought against them; but an acquittal on such an indictment will not establish the non-liability of the defendants, because it might have proceeded on the ground that the road was not out of repair, and thus, the question of liability might not have been decided.² Whether an acquittal on an information in rem on the Revenue side of the Queen's Bench Division will be conclusive proof of the illegality of the seizure as against strangers, in the same way as a judgment of condemnation is conclusive in favour of its legality, may admit of some doubt. Lord Kenyon on one occasion seems to have considered that it was conclusive,³ but the point has never been expressly determined; and as an acquittal does not, like a conviction, ascertain any precise fact, but may be occasioned by the laches of the prosecutor, it certainly seems reasonable to contend that strangers should not thereby be conclusively bound.⁴

§ 1723. In *Day v. Spread*,⁵ an action was brought in Ireland for § 1532 necessities supplied to the defendant's wife, while living separate from her husband. In support of the plaintiff's claim, witnesses were called to prove that the separation was justifiable on the wife's part, as it was owing to the cruel and violent treatment of her husband. In order to rebut this case, and also to prove that the wife had been guilty of adultery, the defendant tendered in evidence a sentence of the Ecclesiastical Court, *dismissing* a suit instituted by

¹ *R. v. Wick St. Lawrence*, 5 B. & Ad. 533, per Ld. Denman; 535, per Parke, J.; *Heston v. St. Bride*, 22 L. J., M. C. 65; 1 E. & B. 583, S. C.

² *R. v. St. Pancras*, Pea. R. 220, 221; *R. v. Haughton*, 1 E. & B. 501, 514; *R. v. Nether Hallam*, 6 Cox, 435.

³ *Cooke v. Sholl*, 5 T. R. 256.

⁴ *B. N. P.* 245; 2 Ph. Ev. 38, 39.

⁵ *Jebb & B.* 163.

the wife against her husband for a divorce on account of cruelty, in which suit the husband had made a counter allegation of adultery. The majority of the judges held, that this evidence was admissible, though Mr. Justice Perrin, in an able judgment, advanced a contrary opinion; but the whole court considered, that, if received at all, it was entitled to very little weight; whereas, had the Ecclesiastical Court divorced the parties, its sentence would, doubtless, have been conclusive in favour of the plaintiff.

§ 1724. With regard to *foreign judgments*,—which term includes judgments, decrees, and other adjudications, whether strictly of record or not, emanating from Irish, Scotch, colonial, or foreign tribunals,¹—their *admissibility and effect* in English courts will be found to depend on rules, which in many respects are similar to those that apply to home judgments. For instance, they are always admissible, whether for or against strangers or parties, in proof of their existence;²—they are divisible into judgments in rem and judgments inter partes, the former being evidence of the facts adjudicated as against all the world, the latter being only admissible for and against parties and privies;³—they furnish no evidence whatever of matters collaterally or incidentally noticed in them, still less of matters to be inferred by argument from them;⁴—they must, in order to be received, finally determine the points in dispute, and be adjudications upon the actual merits;⁵—and they are open to be impeached on the ground, either of fraud⁶ or collusion,⁷

¹ *Houlditch v. M. of Donegal*, 8 Bligh, N. R. 337, 338, per Ld. Brougham; 2 Cl. & Fin. 476, 477, S. C.; *Ferguson v. Mahon*, 11 A. & E. 179; 3 P. & D. 143, S. C.; *Harris v. Saunders*, 4 B. & C. 411; 6 D. & R. 471, S. C., as to Irish judgments; *Cowan v. Braidwood*, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C.; *Russell v. Smyth*, 9 M. & W. 810, as to Scotch judgments; *Henderson v. Henderson*, 6 Q. B. 288; 11 Q. B. 1015, S. C.; as to colonial decrees.

² *Tarleton v. Tarleton*, 4 M. & Sel. 20; ante, § 1667.

³ Ante, § 1673.

⁴ Ante, § 1711.

⁵ *Plummer v. Woodburn*, 4 B. & C. 625; 7 D. & R. 25, S. C.; *Smith v. Nicolls*, 5 Bing. N. C. 222, per Tindal, C. J.; *Sadler v. Robins*, 1 Camp. 253; *Garcias v. Ricardo*, 14 Sim. 265; *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

⁶ *Ochsenbein v. Papelier*, 8 Law Rep., Ch. App. 695; 42 L. J., Ch. 261, S. C.; *Abouloff v. Oppenheimer*, 52 L. J., Q. B. 1; L. R., 10 Q. B. D. 295, per Ct of App. S. C.

⁷ *Price v. Dewhurst*, 8 Sim. 302—309, per Shadwell, V.-C.; 4 Myl. & Cr.

or of want of jurisdiction, whether over the cause, over the subject-matter, or over the parties.¹

§ 1725. The subject of *jurisdiction* deserves further notice; and § 1534 here it may first be observed, that the courts of this country will so far presume that a foreign tribunal has acted within the limits of its authority, and that its proceedings are regular, that, if an action be brought upon a foreign judgment, the plaintiff need not allege in his statement of claim, either that the foreign court had jurisdiction over the parties or the cause,² or that the proceedings had been properly conducted.³ It seems, however, to be still necessary for a defendant to state these particulars, when he pleads such judgment by way of estoppel or of justification.⁴ Next, although it will scarcely be expected in a work like the present, that all the cases should be noticed, in which foreign judgments have been rejected as having emanated from a court having no jurisdiction, it may be useful to refer to a few leading decisions on the subject. Thus, sentences of foreign *prize* courts have repeatedly been held invalid by English judges, as being pronounced by a court having no jurisdiction, when it appeared that the court had sate in a neutral country under a commission from a belligerent power;⁵ and for this purpose a country has been considered neutral, where its independence was in form only preserved, the belligerent having poured into it such a body of troops, as in reality to possess the sovereign authority.⁶

85, per Ld. Cottenham, S. C., on appeal; *Don v. Lippmann*, 5 Cl. & Fin. 20, per Ld. Brougham; *Magoun v. N. Engl. Ins. Co.*, 1 Story, R. 157; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600.

¹ *Price v. Dewhurst*, 4 Myl. & Cr. 85, per Ld. Cottenham; *Rose v. Himely*, 4 Cranch, 269, 270, per Marshall, C. J.

² *Robertson v. Struth*, 5 Q. B. 941.

³ *Cowan v. Braidwood*, 1 M. & Gr. 882, 892, 895, per Maule, J.; 2 Scott, N. R. 138, S. C.

⁴ *Collett v. Ld. Keith*, 2 East, 260; *Gen. St. Navig. Co. v. Guillou*, 11 M. & W. 877, 894. See *Ricardo v. Garcias*, 12 Cl. & Fin. 377, 378, 381.

⁵ *The Flad Oyen*, 8 T. R. 270, n. by Sir W. Scott; *Havelock v. Rockwood*, 8 T. R. 276. These cases virtually overrule a doubt thrown out by Ld. Kenyon in *Smith v. Surridge*, 4 Esp. 26, 27.

⁶ *Donaldson v. Thompson*, 1 Camp. 429, per Ld. Ellenborough.

§ 1726. Again, it is decided that no foreign court has power, so far as any consequences in England are concerned, to annul a marriage solemnized in England between English subjects;¹ at least, if at the date of the divorce à vinculo, the parties were not bonâ fide domiciled in the foreign state.² But if parties, domiciled in Scotland, be married in England, they may legally be divorced by a Scotch court; and such divorce will be recognised as valid in England, though the woman prior to the wedding may have been an English subject, and the grounds on which her divorce rested may have been such as in England would not justify the dissolution of the nuptials.³ Whether the judgment of a foreign country on the validity of a marriage, which has been celebrated, either within its territories between parties who are not subjects of that country, or beyond its territories between parties, one or both of whom are natives of some other foreign state, would be binding upon our courts, is also an undetermined and difficult question, which depends upon principles of international law respecting jurisdiction, that are not yet definitely settled.⁴ On principle, however, it seems clear, that such a judgment should be either wholly inadmissible, or conclusive, in our courts, according as it should appear to have been pronounced by a tribunal not having, or having, jurisdiction over the subject-matter.⁵ And the same doctrine would

¹ *R. Lolley, R. & R.* 237; *Briggs v. Briggs*, L. R., 5 Pr. D. 163; *Tovey v. Lindsay*, 1 Dow, 117; *In re Wilson's Trusts*, 1 Law Rep., Eq. 247; 35 L. J., Ch. 243, S. C. See *Harvey v. Farnie*, L. R., 5 Pr. D. 153.

² *Conway v. Beazley*, 3 Hagg. Ec. R. 639, 645—647, 653, per Dr. Lushington; *Tollemache v. Tollemache*, 30 L. J., Pr. & Mat. 113; *Robins v. Dolphin*, 27 L. J., Pr. & Mat. 24; 1 Swab. & Trist. 37, S. C.; *Dolphin v. Robins*, 29 L. J., Pr. & Mat. 11, in Dom. Proc.; 7 H. of L. Cas. 390, S. C.; 3 Macq. Sc. Cas. H. of L. 563, S. C.; *Shaw v. Gould*, 3 Law Rep., H. L. 55; 37 L. J., Ch. 433, in Dom. Proc., S. C.; *Dorsey v. Dorsey*, 7 Watts, 350, per Gibson, C. J.; *Story*, Confl. § 230 a.

³ *Harvey v. Farnie*, L. R., 5 Pr. D. 153; aff. on app. L. R., 6 P. D. 35; 50 L. J., P. D. & A. 17, S. C.; and in Dom. Proc., L. R., 8 App. Cas. 43; 52 L. J., Pr. & D. 33. This case overrules *McCarthy v. De Caix*, 2 Russ. & Myl. 614; 3 Hagg. Ec. Rep. 642, n.; 2 Cl. & Fin. 568, n. S. C. See *Warrender v. Warrender*, 9 Bligh, 89; 2 Cl. & Fin. 488, 540, 541, 558, S. C.; and *Geils v. Geils*, 1 Macq. Sc. Cas. H. of L. 255.

⁴ *Sinclair v. Sinclair*, 1 Hagg. Cons. 297, per L. Stowell. See *Connelly v. Connelly*, 2 Roberts. 202.

⁵ See *Dogliani v. Crespin*, 35 L. J., Pr. & Mat. 129, in Dom. Proc.; 1 Law Rep., H. L., 301, S. C.

equally apply to judgments of divorce pronounced by the court of a foreign country, when the marriage had not been celebrated, and the parties were not domiciled, in that country.¹

§ 1727. With respect to judgments *inter partes*, a doubt has § 1536 been entertained as to whether a foreign court can exercise any jurisdiction over *real property* situate in another country. It clearly cannot do so *immediately*, because its judgment cannot directly bind the land;² and, consequently, where the Court of Chancery in Ireland, after verdict upon an issue *devisavit vel non*, had decreed that the instrument set up as a will was not an operative devise of certain Irish estates, it was held that this decree could not be pleaded in bar to a suit between the same parties in the Court of Chancery in England, which had been instituted by the devisee for the purpose of establishing the will, so far as it related to some English property.³ Still, a foreign court may, as it seems, *indirectly*, affect land in this country by acting in *personam*, that is, through the medium of its power over the person entitled to the property; and therefore, if an Irish, colonial, or foreign court were, by a valid decree, to appoint a receiver in this country, the party, on whose behalf the appointment was made, might probably, by action in the English Chancery Division, get his foreign decree carried into execution. At least, the converse of the above rule was, a few years back, solemnly decided in the House of Lords.⁴

§ 1728. Questions of jurisdiction have also frequently arisen, § 1537 where the party, seeking to avoid the effect of a foreign judgment, has pleaded, with more or less particularity, that he was not, at the time of the proceedings against him, either resident within the territories of the foreign state, or the subject of such state; and here the rules, as far as they can be collected from the cases, appear to be these; first, that the statement of defence must contain every allegation which is necessary to render the judgment invalid, and must,

¹ See Story, Conf. § 203, et seq.

² Burnham v. Webster, 1 Woodb. & M. 176.

³ Boyse v. Colclough, 1 Kay & J. 124, per Wood, V.-C.

⁴ Houlditch v. Donegal, 8 Bligh, N. S. 301, 343—345, per Ld. Brougham; 2 Cl. & Fin. 470, 479—481; Lloyd & G. 82, S. C.

in short, be good *in omnibus*;¹ and next, that among the necessary allegations must be included averments, that the defendant was not a subject of the foreign state, or resident, or even present, in it, at the time when the proceedings were instituted, so that he could not be bound, by reason of allegiance, or domicile, or temporary presence, by the decision of its courts;² and further, that he was not the owner of real property in such state, for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present, though really absent.³ Moreover, it will generally be advisable, if not necessary, to add, that the defendant has had no notice or knowledge of the proceedings.⁴

§ 1729. Besides the rules already stated,⁵ which are common to foreign and domestic judgments, others may be cited, which, if not exclusively applicable to foreign adjudications, are at least far more frequently applied to them than to the decisions of our own courts. For instance, if it be apparent upon the face of the proceedings, or can be made so by extrinsic proof, that a foreign judgment is contrary to the law of nations,⁶ or is repugnant to natural justice,⁷ or is founded on a mistaken notion of the Court's jurisdiction,⁸ or is

¹ *Cowan v. Braidwood*, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C.; *Becquet v. MacCarthy*, 2 B. & Ad. 951; explained in *Don v. Lippmann*, 5 Cl. & Fin. 21, per Ld. Brougham; *Maubourquet v. Wyse*, I. R., 1 C. L. 471, per Ex.

² *Gen. St. Navig. Co. v. Guillou*, 11 M. & W. 894; *Cowan v. Braidwood*, 1 M. & Gr. 892, 893, per Tindal, C. J.; *Russell v. Smyth*, 9 M. & W. 810; *Reynolds v. Fenton*, 3 Com. B. 187; *Rousillon v. Rousillon*, 46 L. J., Ch. 338, per Fry, J.; L. R., 5 Ch. D. 351, S. C.

³ *Cowan v. Braidwood*, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C.; *Douglas v. Forrest*, 4 Bing. 686, 701—703; 1 M. & P. 663, S. C.

⁴ *Cowan v. Braidwood*, 1 M. & Gr. 893; see *Maubourquet v. Wyse*, I. R., 1 C. L. 471, per Ex.

⁵ Ante, § 1724.

⁶ *Baring v. Claggett*, 3 B. & P. 215, per Ld. Alvanley; *Wolff v. Oxholm*, 6 M. & Sel. 92; *Simpson v. Fogo*, 1 Johns. & Hem. 18; 32 L. J., Ch. 249; and 1 Hem. & M. 195, S. C., in a subsequent stage.

⁷ *Ferguson v. Mahon*, 11 A. & E. 181, per Ld. Denman, citing *Becquet v. MacCarthy*, 2 B. & Ad. 951; *Henderson v. Henderson*, 6 Q. B. 298 per Ld. Denman; *Buchanan v. Rucker*, 1 Camp. 63, per Ld. Ellenborough; 9 East, 192, S. C.; *Cowan v. Braidwood*, 1 M. & Gr. 895, per Maule, J.; *Sims v. Thomas*, 3 Ir. Law R. 417, per Brady, C. J.; *Messina v. Petrocchino*, 4 Law Rep., P. C. 144, 157; 8 Moo. P. C., N. S. 375, S. C.

⁸ *Schibsy v. Westenholz*, 40 L. J., Q. B. 73; 6 Law Rep., Q. B. 155, S. C.; *Novelli v. Rossi*, 2 B. & Ad. 757; S. C. more full, 9 L. J., K. B. 307 (O. S.); as explained in *Castrique v. Imrie*, 39 L. J., C. P. 358, per Blackburn, J., in (4350)

obviously or admittedly¹ opposed to the law of the country where it was pronounced,² or is so grossly defective as to render it doubtful what point, if any, was actually determined,³ or is manifestly erroneous, as professing to be made upon particular grounds, which plainly do not warrant the decision,⁴ its effect as evidence will be wholly neutralised.

§ 1730. In stating that foreign judgments, when *repugnant to natural justice*, will be disregarded in English courts, vague language is undoubtedly used; and it may be thought by those who are inclined to be censorious, that the frequent allusion to this rule by our judges savours slightly of a Chinese contempt for "outside barbarians." Still, it cannot be denied that the rule, in some cases, has been productive of much good; as, for instance, in *Price v. Dewhurst*,⁵ where a judgment pronounced in the Danish island of St. Croix was disregarded in our courts, it appearing that one of the litigating parties had himself acted as the judge, and had decided the question in dispute in his own favour. So, it has several times been held, both in England and America, that a defendant may defeat the effect of a foreign judgment by pleading and proving, that in the court from which it proceeded no suit can be instituted without issuing process, and yet that he was never arrested, or served with, or had notice or knowledge of, any process at the suit of the plaintiff for the cause of action upon which the judgment was recovered, and that he had never appeared thereto; for the common justice of all nations requires that no condemnation should be pronounced behind the back of a man,⁶ who has had

answer to the House of Lords. See, also, *Goddard v. Gray*, 40 L. J., Q. B. 62; 6 Law Rep., Q. B. 139, S. C., where the court held that a foreign judgment could not be impugned on the ground that it proceeded on a mistake as to English law.

¹ *Meyer v. Ralli*, L. R., 1 C. P. D. 358; 45 L. J., C. P. 741, S. C.

² *Sims v. Thomas*, 3 Ir. Law R. 415.

³ *Obicini v. Bligh*, 8 Bing. 335; 1 M. & Sc. 477, S. C.

⁴ *Calvert v. Bovill*, 7 T. R. 523; *Pollard v. Bell*, 8 T. R. 434; *Reimers v. Druce*, 26 L. J., Ch. 196, 199, per Romilly, M. R.; 23 Beav. 145, 150, 154, S. C.; *Simpson v. Fogo*, 1 Johns. & Hem. 18; 1 Hem. & M. 195; 32 L. J., Ch. 249, S. C.; *Messina v. Petrocchino*, 4 Law Rep., P. C. 144, 157; 8 Moo. P. C. N. S. 375, S. C.

⁵ 8 Sim. 279, 305, 306; 4 Myl. & Cr. 76, 85, S. C. See *Gd. Junct. Can. Co. v. Dimes*, 12 Beav. 63; 2 Hall & T. 92; 2 M. & Gord. 285, S. C.

⁶ Where a man had been expelled from a club without being heard in his

no opportunity to appear and defend his interest, either personally or by his proper representatives.¹

§ 1731. The defendant, however, in framing such a statement of defence, must carefully negative every combination of facts on which the judgment can be supported; and therefore, if he merely deny that he has had notice of any *process*, and do not allege, that without process the suit in a foreign court would be a nullity, his statement will be bad in point of law; unless, perhaps, in the event of its containing a distinct averment, that he has had no notice or knowledge whatever of the *suit*.² In *Ferguson v. Mahon*,³ the plea, indeed, was held good, though it merely denied a notice of process; but that own defence, the court, considering that the committee of the club had been exercising quasi-judicial functions improperly, declared their resolution void, and granted an injunction. *Fisher v. Keane*, 49 L. J., Ch. 11, per Jessel, M. R. See, also, *Dawkins v. Autrobus*, L. R., 17 Ch. D. 645.

¹ *Ferguson v. Mahon*, 11 A. & E. 179; 3 P. & D. 143, S. C.; *Buchanan v. Rucker*, 1 Camp. 63; 9 East, 192, S. C.; *Cavan v. Stewart*, 1 Stark. R. 525; *Houlditch v. Donegal*, 8 Bligh, N. S. 338, 339, per Ld. Brougham; *R. v. Abp. of Canterbury*, 28 L. J., Q. B. 154, 159; *Vallée v. Dumerque*, 4 Ex. R. 290; *In re Brook & Delcomyn*, 16 Com. B., N. S. 403; 33 L. J., C. P. 246, S. C.; *Copin v. Adamson*, 43 L. J., Ex. 161; 9 Law Rep., Ex. 345, S. C.; 45 L. J., Ex. 15 S. C., per Ct. of App.; Law Rep., 1 Ex. D. 17, S. C.; *Story*, Conf. § 592; *Sawyer v. Maine Fire & Mar. Ins. Co.*, 12 Mass. 291; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600; *Magoun v. New Eng. Ins. Co.*, 1 Story, R. 157; *Rangeloy v. Webster*, 11 New Hamp. 299, recognised in *Burnham v. Webster*, 1 Woodb. & M. 178. In *Dr. Bentley's case*, Fost. C. L. 202; 1 Str. 557; Andr. 176; 2 Ld. Ray. 1334, S. C., *Foster, J.*, refers to a very old precedent in support of this doctrine. "I have heard it observed by a very learned man," says he, "that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam,' says God, 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also." The above passage, though somewhat irreverent, appears to be in favour with the judges. It was cited with approbation by *Maule, J.*, in *Abley v. Dale*, 10 Com. B. 71, 72; and by *Byles, J.*, in *Cooper v. Wands. Bd. of Works*, 32 L. J., C. P. 188; 14 Com. B., N. S. 195, S. C. Yet, oddly enough, it is an authority not strictly in point; for though our first parents were certainly asked what they had to say why judgment should not pass against them, the same question was as certainly not put to the serpent; and as he was at *that* time endowed with miraculous powers of speech, it seems strange that, before he was "cursed above all cattle," and was sentenced to "go upon his belly, and eat dust," he was not asked whether he had *really* "beguiled Eve," and if so, for what cause.

² *Reynolds v. Fenton*, 3 Com. B. 187; *Sheehy v. The Profess. Life Assur. Co.*, 13 Com. B. 787; *Maubourquet v. Wyse*, I. R., 1 C. L. 471, per Ex.

³ 11 A. & E. 179; 3 P. & D. 143, S. C.

case, which was an action on an Irish judgment, can only be sustained, if at all,¹ on the ground that an English Court will judicially recognise the fact that an action must be commenced by process in Ireland.² Other cases connected with this subject have already been referred to, while treating of the want of jurisdiction.³

§ 1732. The most difficult point connected with foreign judgments is, to determine when they are *conclusive*, and when they are merely *prima facie* evidence of the facts adjudicated by them; and here it will be convenient to consider the subject as it relates, first, to judgments in rem; next, to judgments inter partes, when they are set up by way of defence to a suit in a domestic tribunal; and lastly, to such judgments, when they are sought to be enforced in our own courts against the original defendant, or his estate. § 1541

§ 1733. And first, as to *foreign judgments in rem*. The most important of these are the sentences of condemnation by foreign Courts of Admiralty on questions of *prize*; and here, although Lord Thurlow and Lord Ellenborough were wont to say that the practice of receiving them at all in evidence rested upon an overstrained comity, and was often productive of cruel injustice,⁴ it is now too late to dispute the rule, that provided such sentences are not impeachable upon some one of the grounds before stated,⁵ they will be conclusive against all persons, and in all countries, as to the fact upon which the condemnation proceeded, where such fact is stated on the face of the sentence, free from ambiguity.⁶ At the same time it is equally clear, that the ground of condemnation may still be contested in an English court of law, when the language of the sentence, by setting out several reasons for the judgment, leaves it uncertain whether the ship was condemned upon a ground which would warrant its condemnation by the law of nations, or

¹ *Sheehy v. The Profess. Life Assur. Co.*, 13 Com. B. 787.

² *Reynolds v. Fenton*, 3 Com. B. 191, per Maule, J.

³ Ante, §§ 1725, 1728.

⁴ *Fisher v. Ogle*, 1 Camp. 419, 420; *Donaldson v. Thompson*, id. 432.

⁵ Ante, §§ 1724, 1725, 1729.

⁶ *Dalgleish v. Hodgson*, 7 Bing. 504, per Tindal, C. J.; *Bolton v. Gladstone*, 5 East, 160, per Ld. Ellenborough; *Lothian v. Henderson*, 3 B. & P. 499, 517, per Le Blanc, J.; *Kindersley v. Chase*, 2 Park, Ins. 743—752. See *Cammell v. Sewell*, 3 H. & N. 617, 646; 5 H. & N. 742, S. C.

upon another ground, which amounts only to a breach of the municipal regulations of the condemning country,¹

§ 1734. Whether a sentence, which, without stating any ground of decision, should condemn a vessel as lawful prize, would be conclusively presumed to have been pronounced on some just ground, is a question of doubt. Lord Mansfield, and several other eminent judges of the last century, entertained an opinion in favour of its conclusive character;² but this doctrine has since been much shaken; and in a case of some importance Chief Justice Tindal has not hesitated to declare, that, in order to bind strangers, the ground of the decision must appear clearly upon the face of the sentence, and that it will not suffice for it to be collected by *inference* only.³ Perhaps, the safest rule on the subject would amount to no more than this; that if, in an action upon a policy of insurance containing a warranty of neutrality, the underwriter were to rely upon a general sentence of condemnation, the assured might still show that in fact the judgment had proceeded upon some ground other than that of infraction of neutrality;⁴ although, in the absence of such proof, the court would certainly feel bound to pronounce that the ship was condemned as enemies' property.⁵ § 1543

§ 1735. Another important class of foreign judgments in rem consists of sentences concerning *marriage*, and sentences of *divorce*.⁶ § 1544 These, when pronounced in the country where the marriage was solemnized, and the parties are domiciled, will be regarded in the

¹ *Dalgleish v. Hodgson*, 7 Bing. 495, 504; 5 M. & P. 407, S. C.; *Hobbs v. Henning*, 17 Com. B., N. S. 791; 34 L. J., C. P. 117, S. C.; *Bernardi v. Motteux*, 2 Doug. 575; *Calvert v. Bovill*, 7 T. R. 523; *Baring v. Clagett*, 3 B. & P. 215.

² *Saloucci v. Woodmass*, 2 Park, Ins. 727, per Ld. Mansfield; recognised by Ld. Alvanley in *Baring v. Clagett*, 3 B. & P. 215; and by Lawrence, J., in *Lothian v. Henderson*, 3 B. & P. 527; *Pollard v. Bell*, 8 T. R. 438, per Grose, J.; 444, per Le Blanc, J.

³ *Dalgleish v. Hodgson*, 7 Bing. 504; *Fisher v. Ogle*, 1 Camp. 418, per Ld. Ellenborough. ⁴ *Calvert v. Bovill*, 7 T. R. 527, per Lawrence, J.

⁵ For American authorities respecting proceedings in rem in foreign courts of Admiralty, see *Croudson v. Leonard*, 4 Cranch, 434; *Williams v. Armroyd*, 7 Cranch, 423; *Hudson v. Guestier*, 4 Cranch, 293; *The Mary*, 9 Cranch, 126, 142—146; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600; *Grant v. M'Lachlin*, 4 Johns. 34; *Burnham v. Webster*, 1 Woodb. & M. 176.

⁶ The whole subject of foreign divorce is ably discussed in Story, *Confli.* §§ 200—230 b.

courts of England as conclusive of the facts adjudicated, unless they be open to some of the objections before stated;¹ for otherwise, as Lord Hardwicke once observed, “the right of mankind would be very precarious.”²

§ 1736. Foreign jurists strongly contend, that a similar doctrine § 1515 should prevail in favour of all judgments in rem; and, consequently, that the decree of a foreign court, declaring the status of a person, and placing him, as an idiot, or a minor, or prodigal, under *guardianship*, should be deemed of universal authority and obligation. So it doubtless would be deemed, in regard to all acts done within the territories of the sovereign whose tribunal pronounced the sentence. But, in this country, as also in America, the rights and powers of *guardians* are considered as strictly local; and no guardian is here admitted to have any right to receive the profits, or to assume the possession, of the real estate of his ward, or to control his person, or to maintain any action for his personalty, without having received a due appointment from the proper English authority.³

§ 1737. The decisions of foreign courts of *bankruptcy* and *insol-* § 1546·
veny may be placed in the same category with decrees appointing guardians; and, therefore, although the discharge of a debtor under the bankrupt or insolvent laws of a foreign State will so far be recognised in this country, that it will be held of binding authority with respect to all contracts made in such State, it cannot be here

¹ Ante, §§ 1724, 1725, 1729.

² *Roach v. Garvan*, 1 Ves. Sen. 159; Ex. p. *Cottington*, 2 Swanst. 326, n.; S. C., cited in *Boucher v. Lawson*, Cas. temp. Hard. 9; *Sinclair v. Sinclair*, 1 Hagg. Cons. 297.

³ *Dawson v. Jay*, 2 Sm. & Gif. 199; Ex p. *Watkins*, 2 Ves. Sen. 470 a; *Story*, Confl. §§ 499, 504, 504 a, 594; *Morrell v. Dickey*, 1 Johns. Ch. R. 153; *Kraft v. Wickey*, 4 Gill & J. 332, 340, 341. See, however, *Grimwood v. Bartels*, 46 L. J., Ch. 788, where Hall, V.-C., allowed a foreign curator ad bona of a lunatic to receive the income derivable from the lunatic's real estate in this country, though he would not allow the estate itself to be conveyed to him. See, also, In re *Garnier*, 13 Law Rep., Eq. 532, per Malins, V.-C.; 41 L. J., Ch. 419, S. C., and *Scott v. Bentley*, 24 L. J., Ch. 244; 1 Kay & J. 281, S. C., where Wood, V.-C.,—apparently misled by an erroneous reference, see 46 L. J., Ch. 789,—held, that a curator bonis of a lunatic's estate appointed by a Scotch court might sue in England for debts due to the lunatic. Therefore quære.

pleaded in bar to any action, which is brought on a contract made or to be performed elsewhere.¹

§ 1738. The same rule is also applied to the case of *executors* § 1547 and *administrators*; and it is now clearly established, that, in order to sue or be sued in any court of England, in respect of the personal rights or property of a testator or intestate, the plaintiff,² or defendant,³ as the case may be, must appear to have obtained a probate, or letters of administration, in the proper court of this country. A foreign probate or letters, granted by the court of the country where the deceased was domiciled, may be brought under the notice of the English Court of Probate, with the view of inducing that tribunal to clothe the foreign executor or administrator with proper English powers;⁴ but until he be so clothed, he cannot sue in this country; and when he is so clothed, he may sue without showing, in addition to his English title, that any probate or letters have been granted to him by a foreign court.⁵ If, indeed, an executor or administrator, under a valid foreign probate or grant, has received a debt due to the deceased in the foreign country, and given a release for it, this will be a bar to any demand against the debtor on the part of an executor or administrator appointed in England; and to this extent, and for this purpose only,⁶ the English tribunals will recognise and give effect to foreign probates and grants.⁷

§ 1739. Next, as to foreign *judgments inter partes*, when they § 1548

¹ *Towne v. Smith*, 1 Woodb. & M. 115, where this question is very fully discussed by Woodbury, J.

² *Whyte v. Rose*, 3 Q. B. 507, per Tindal, C. J., pronouncing the judgment of Ex. Ch.; *Spratt v. Harris*, 4 Hagg. Ec. R. 405; *Price v. Dewhurst*, 4 Myl. & Cr. 80—82, per Ld. Cottenham; *Lasseur v. Tyrconnel*, 10 Beav. 28. But see *M'Mahon v. Rawlings*, 16 Sim. 429. See, also, *Vanquelin v. Bouard*, 15 Com. B., N. S. 341; 33 L. J., C. P. 78, S. C.

³ *Silver v. Stein*, 21 L. J., Ch. 312, per Kindersley, V.-C.

⁴ *Price v. Dewhurst*, 4 Myl. & Cr. 84; *Enokin v. Wylie*, 10 H. of L. Cas. 1; *Miller v. James*, 3 Law Rep., P. & D. 4; 42 L. J., Pr. & Mat. 21, S. C.

⁵ *Whyte v. Rose*, 3 Q. B. 493, 507, 508; *Carter & Crost's case*, Godb. 33.

⁶ See *Tighe v. Tighe*, I. R., 11 Eq. 203; *Lightfoot v. Bickley*, 2 Rawle, 431; *Story*, Conf. § 522.

⁷ *Danyel v. —*, Dalison, 76; S. C., as *Daniel v. Luker*, 3 Dyer, 305 a, pl. 58; recognised and explained in *Whyte v. Rose*, 3 Q. B. 510.

are set up by way of *defence* to an action in a domestic court. Such a judgment, when pronounced *adversely* to the party who brings the second action, will be conclusively binding upon him, provided it be properly pleaded by way of estoppel.¹ But the statement of defence requires to be carefully drawn; for, although it need not set forth the proceedings and judgment at length,² yet, if it contain no averment that the plaintiff was, at the commencement of the foreign suit, subject to the jurisdiction of the foreign country, by reason of allegiance, domicil, or temporary presence;³ or that the foreign court had jurisdiction over the subject-matter of the suit; or that, by the law of the foreign country, the judgment recovered was final and conclusive, so as to be an absolute bar to a fresh action;⁴ or that the matters in issue in the foreign court were identical with those sought to be put in issue in the present suit;⁵—in any of these cases, the statement will be exposed to the risk of being held bad if the point of law be duly raised by the plaintiff's reply. Should the defendant, instead of pleading the judgment, content himself with putting it in evidence, it will then,—like a domestic judgment under similar circumstances,—be merely cogent, but not conclusive, evidence in his behalf.⁶

§ 1740. But now, let it be assumed, that the foreign judgment was pronounced *in favour* of the party who brings the second suit. Can the defendant avail himself of such judgment as a defence, where the plaintiff's statement of claim rests on the original cause of action? Clearly he cannot, because the nature of the debt or damage sought to be recovered has not been changed; the plaintiff has no higher remedy in consequence of the foreign judgment, and he cannot issue immediate execution upon it in this country, but can only enforce it by bringing a fresh action.⁷ If, indeed, the foreign

¹ *Philips v. Hunter*, 2 H. Bl. 410, per Eyre, C. J.; *Plummer v. Woodburne*, 4 B. & C. 625; 7 D. & R. 25, S. C.; *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

² *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

³ *Gen. St. Navig. Co. v. Guillou*, 11 M. & W. 877, 894.

⁴ *Plummer v. Woodburne*, 4 B. & C. 625; 7 D. & R. 25, S. C.; *Frayes v. Worms*, 10 Com. B., N. S. 149.

⁵ *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

⁶ *Ante*, §§ 91, 1673.

⁷ *Smith v. Nicolls*, 5 Bing. N. C. 208, 220, 221; 7 Scott, 147, S. C.; *Wilson v. Lady Dunsany*, 18 Beav. 293.

judgment has not only been recovered, but has had satisfaction entered up, it will then be conclusive in favour of the defendant, if properly pleaded.¹ It may here be added, that if a man has been tried and acquitted in a foreign country by a court having competent jurisdiction, he may plead and prove such acquittal in bar of any indictment preferred against him in this country for the same offence.²

§ 1741. When a foreign judgment *inter partes* is sought to be enforced by an action in a domestic tribunal, it matters not whether it has emanated from a court of record, or not of record, from a superior or inferior court, from a court of common law, or from one exercising equitable jurisdiction; but in all cases alike, provided a clear balance has been ascertained, and a final³ decision on the merits has been *bonâ fide* pronounced by a tribunal of competent authority, the successful party may maintain an action upon such foreign judgment in the Queen's Bench Division of the High Court for the recovery of the amount so decided to be due to him.⁴ Even costs awarded by a decree of the Court of Session in Scotland in a suit for a divorce, have been recovered by an action brought against the defendant while resident in this country;⁵ and in conformity with this decision, it seems that, were litigation to arise in France relating to real property, and were costs to be given against a party who should afterwards come to this country, an action for such costs might here be maintained.⁶ The decrees of foreign courts of equity might, indeed, in some instances, not be enforceable in the English Common Law Division, because they

§ 1550

¹ *Barber v. Lamb*, 29 L. J., C. P. 234; 8 Com. B., N. S. 95, S. C.

² *R. v. Roche*, 1 Lea. 134; B. N. P. 245.

³ If the decree or judgment be not final, the action upon it is not maintainable, *Patrick v. Shedden*, 2 E. & B. 14; *Paul v. Roy*, 21 L. J., Ch. 361; 15 Beav. 433, S. C.

⁴ *Henderson v. Henderson*, 6 Q. B. 288; *Sadler v. Robins*, 1 Camp. 255, 256, per *Ld. Ellenborough*; *Henley v. Soper*, 8 B. & C. 16; 2 M. & R. 153, S. C.; as to decrees of colonial courts of equity; *Harris v. Saunders*, 4 B. & C. 411; 6 D. & R. 471, S. C., as to a judgment of one of the superior courts in Ireland; *Arnott v. Redfern*, 3 Bing. 353, as to a judgment of a Court of Admiralty in Scotland.

⁵ *Russell v. Smyth*, 9 M. & W. 810.

⁶ *Id.*, 9 M. & W. 818, per *Ld. Abinger*.

might involve collateral and provisional matters, to which such court could not conveniently give full effect: but even then the English Chancery Division would entertain an action founded on such a foreign decree, for the purpose of giving effect to it in regard to English property.¹

§ 1742. It is admitted on all sides that, in these actions, the foreign judgments are *primâ facie evidence* in support of the plaintiff's claim, and are to be deemed right until the contrary is established.² But the question still remains, are such judgments to be deemed *conclusive*, or can the defendant, by going at large into the *original merits*, dispute the propriety of the decisions? The arguments on either side of this vexed question are well put by Mr. Smith in his admirable note on the Duchess of Kingston's case. "Now, upon one side it is said, that the tribunals of this country are not *bound* to enforce the judgments of a foreign court; that when they do so, it is *de gratiâ*, and from a wish to extend the limits of justice—*ampliare justitiâ*. But that it would be to amplify injustice, not justice, were they to enforce a sentence which ought never to have been pronounced, because against the party with whom right was. On the other side, it is answered with great force, that invariable experience shows, that facts can never be inquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them; that if our courts were to allow matters judicially decided upon to be again opened at any distance of time or place, the consequence would be, in ninety-nine cases out of a hundred, that they would be deceived by the concoction of testimony, or by the abstraction of it, or by the want of it, and that injustice and mistakes, instead of being amended, would be generated."³

¹ Henderson v. Henderson, 6 Q. B. 297, per Ld. Denman; Houlditch v. M. of Donegal, 8 Bligh, N. S. 301; 2 Cl. & Fin. 470; Lloyd & G. 82, S. C.

² Sinclair v. Fraser, per Dom. Proc., cited in 20 How. St. Tr. 468, 469, and in 1 Doug. 4, n.; recognised in Arnott v. Redfern, 3 Bing. 357, and in Robertson v. Struth, 5 Q. B. 943, 944; Cowan v. Braidwood, 1 M. & Gr. 892, 895, per Maule, J.

³ 2 Smith, L. C. 686.

§ 1743. Mr. Justice Story, too, in his *Conflict of Laws*, makes the following forcible observations in support of the conclusiveness of foreign judgments. “It is, indeed,” says he, “very difficult to perceive what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the court upon the whole evidence, may have been decidedly in favour of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to re-try the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed *ex æquo et bono*? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule, that the judgment is to be *prima facie* evidence for the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand, that the defendant may be at liberty to impeach the original justice of the judgment, by showing that the court had no jurisdiction; or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular, and bad by the local law *Fori rei judicatæ*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits

of the original cause at large, and to put the defendant upon proving those merits.”

§1744. In accordance with these views, it has several times § 1553
 been held by the Court of Queen's Bench,² once by the Court of
 Common Pleas,³ and once by the Court of Exchequer,⁴ that no
 inquiry can be instituted into the merits of the original action, or
 the propriety of the decision; and that the defendant is not at
 liberty to raise any objection, which would have constituted a
 defence in a foreign court, and which, consequently, should there
 have been pleaded and finally disposed of. The same doctrine, too,
 has been advanced with more or less confidence, by Lord Notting-
 ham,⁵ Lord Kenyon,⁶ Lord Ellenborough,⁷ Sir L. Shadwell,⁸ Lord
 Wensleydale,⁹ and the Court of Exchequer in Ireland.¹⁰ On the
 other hand, Lord Hardwicke,¹¹ Lord Mansfield,¹² Chief Baron Eyre,¹³
 Mr. Justice Buller,¹⁴ Mr. Justice Bayley,¹⁵ and especially Lord
 Brougham,¹⁶ have strenuously contended that foreign judgments,
 where actions are brought upon them, are merely *prima facie*
 evidence on behalf of the plaintiff; and this rule also prevails in
 America, though the extent to which it should be carried is certainly

¹ Story, *Confl.* § 607. See, also, *Bk. of Australasia v. Nias*, 16 Q. B. 735—737, per *Ld. Campbell*.

² *Henderson v. Henderson*, 6 Q. B. 288, 298, 299; *Ferguson v. Mahon*, 11 A. & E. 179, 183; 3 P. & D. 143, S. C.; *Bk. of Australasia v. Nias*, 16 Q. B. 717; *Munroe v. Pilkington*, 31 L. J., Q. B. 81; 2 B. & S. 11, S. C., *nom. Scott v. Pilkington*.

³ *Vanquelin v. Bouard*, 15 Com. B., N. S. 341; 33 L. J., C. P. 78, S. C.

⁴ *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; 30 L. J., Ex. 238, S. C.

⁵ *Gold v. Canham*, cited in note to *Kennedy v. Cassillis*, 2 Swanst. 325.

⁶ *Galbraith v. Neville*, 1 Doug. 6, n.

⁷ *Tarleton v. Tarleton*, 4 M. & Sel. 22.

⁸ *Martin v. Nicolls*, 3 Sim. 458.

⁹ Citing *Martin v. Nicolls*, in *Becquet v. MacCarthy*, 2 B. & Ad. 954.

¹⁰ *Sims v. Thomas*, 3 Ir. Law R. 415.

¹¹ *Isquierdo v. Forbes*, cited by *Ld. Mansfield*, in 1 Doug. 6.

¹² *Walker v. Witter*, 1 Doug. 1.

¹³ *Philips v. Hunter*, 2 H. Bl. 410.

¹⁴ *Galbraith v. Neville*, 1 Doug. 6, n.; *Messin v. Ld. Massareene*, 4 T. R. 493.

¹⁵ *Tarleton v. Tarleton*, 4 M. & Sel. 23.

¹⁶ *Houlditch v. M. of Donegal*, 8 Bligh, N. S. 301, 337—342; 2 Cl. & Fin. 470, 477—479, S. C.; *Don v. Lippmann*, 5 Cl. & Fin. 1, 20—22.

not yet definitely settled in that country.¹ On the whole it seems,—if an opinion may be expressed on a subject respecting which so much doubt prevails,—that the arguments, if not the authorities, in support of the conclusiveness of foreign judgments, preponderate over those in favour of a contrary doctrine.

§ 1745. But, however this precise point may be ultimately determined, it appears to be acknowledged law both in England and America,² that, when a foreign judgment,—instead of being itself the consideration of the promise declared on,—merely comes *incidentally* or *collaterally* in question, it cannot be disputed. Thus, in *Tarleton v. Tarleton*,³ the plaintiff and defendant had been partners, and the latter, on the dissolution of the partnership, had covenanted to indemnify the former against the debts of the late firm. In an action on that covenant, the plaintiff, in order to prove the damnification, put in a judgment recovered in a foreign court by a creditor of the firm against himself and the defendant, in consequence of which his property had been seized; and the court held, that the defendant was not at liberty to show that the proceedings were erroneous. § 1554

§ 1746. Another rule connected with this subject has already been referred to as equally clear,⁴ and that is, that a foreign judgment does not occasion a *merger* of the original cause of action; and, therefore, when it becomes necessary to enforce the plaintiff's demand in this country, he may either resort to such original cause, or bring an action upon the judgment.⁵ In the event of his adopting the former of these courses, it seems that the defendant may still, notwithstanding the production of the judg- § 1555

¹ Story, Confl. § 608, and cases there cited; *Burnham v. Webster*, 1 Woodb. & M. 172.

² See cases cited in Cowen's note to 1 Ph. Ev. 353, Am. Ed.

³ 4 M. & Sel. 20; recognised by Ld. Brougham in *Houlditch v. M. of Donegal*, 8 Bligh, N. S. 341; 2 Cl. & Fin. 478, S. C.

⁴ Ante, § 1740.

⁵ *Hall v. Odber*, 11 East, 118, 126, 127, per Bayley, J.; *Smith v. Nicolls*, 5 Bing. N. C. 221, 222, per Tindal, C. J.; *Bk. of Australasia v. Harding*, 19 L. J., C. P. 345; 9 Com. B. 661, S. C.; *Kelsall v. Marshall*, 26 L. J., C. P. 19; 1 Com. B., N. S. 241, S. C.

ment, dispute the plaintiff's demand; for it may well be contended, that, by this mode of declaring, the plaintiff has himself courted a reinvestigation of the merits.¹

§ 1747. Having now stated the general rules which govern the admissibility and effect of domestic and foreign judgments, it remains to point out one or two statutes, by which the receipt in evidence of the adjudications and proceedings of particular tribunals is regulated. And first, as to the adjudications and other proceedings in *Courts of Bankruptcy*. It has been shown that some of these may be proved through the medium of the Gazette in which they have been published,² and that all are capable of proof by producing either the original documents, or copies of them, provided such originals or copies be either sealed with the seal of a bankruptcy court, or signed by a judge in bankruptcy, or, in the case of copies, be certified as true by any registrar of the Court.³ But the question still remains, what is their *effect* when proved? And here it becomes necessary to weigh with some care the capricious language of the Legislature, as applicable to each particular document. Thus, § 132 of the Bankruptcy Act, 1883,⁴—after enacting, in subs. 1, that “a copy of the London Gazette containing any notice, inserted therein in pursuance of this Act⁵ shall be evidence of the facts stated in the notice,”—goes on to provide, in subs. 2, that “the production of a copy of the London Gazette, containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be *conclusive* evidence in all legal proceedings of the order having been duly made, and of its date.”

§ 1748. Again, under sect. 18, subs. 9, of the Act, “a certificate of the official receiver” that a composition, or a scheme of arrangement, has been duly accepted by the creditors, and approved

¹ See 2 Smith, L. C. 683.

² Ante, § 1549.

³ Ante, § 1548.

⁴ 46 & 47 V., c. 52.

⁵ § 13, as to receiving order; § 20, subs. 2, as to order of adjudication; § 35, subs. 3, as to order annulling adjudication. See, also, Bkptcy. Rules, 1883, F. 127, containing, as sub-forms, six other notices. All these notices must be gazetted by the Board of Trade, R. 203.

by the Court, "shall, in absence of fraud, be *conclusive* as to its validity." So, the certificate granted by the Board of Trade declaring any person to be a trustee in bankruptcy, is made by sect. 138, "*conclusive* evidence of his appointment;" and s. 21, subs. 4, provides, that the appointment "shall take effect as from the date of the certificate." In other words, an order of adjudication is henceforth to be regarded in its proper light, that is, as a judgment in rem.¹

§ 1749. The order of the Board of Trade releasing the trustee of a bankruptcy, operates,—as might be assumed without special legislation,—so as to "discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee; but any such order may be revoked on proof that it was obtained by fraud, or by suppression or concealment of any material fact."² § 1559

§ 1750. The order of discharge of a bankrupt,³ which the Court of Bankruptcy is, under certain circumstances, empowered to grant, operates as a discharge of the bankrupt from all debts provable in bankruptcy, save as otherwise provided by the Act,⁴ and, moreover, it will be "conclusive evidence of the bankruptcy, and of the validity of the proceedings thereon."⁵ When an order of discharge has been granted, the Court, if it thinks fit, may award to the bankrupt "a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part;" and this certificate will remove the disqualifications to which he

¹ Revell v. Blake, 41 L. J., C. P. 129; 7 Law Rep., C. P. 300, S. C.; 42 L. J., C. P. 165, per Ex. Ch., S. C.; and 8 Law Rep., C. P. 533; Ex p. Learoyd, In re Foulds, L. R., 10 Ch. D. 3, per Ct. of App.; 48 L. J., Bk. 17, S. C.

² § 82, subs. 3. See, also, 35 & 36 V., c. 58, § 116, Ir.

³ See Bkptcy. Rules, 1883, F. 45. See, also, as to the form and effect of a "certificate of conformity" granted to a bankrupt by the Ct. of Bkptcy. in Irel., 35 & 36 V., c. 58, §§ 57 & 58, Ir. Also, as to the form and effect of a certificate in arrangement cases granted in Irel. id. § 64, Ir.

⁴ 46 & 47 V., c. 52, § 30, subs. 1 & 2. See Jakeman v. Cook, 48 L. J., Ex. 165.

⁵ § 30, subs. 3.

would otherwise be subjected under sect. 32 of the Bankruptcy Act, 1883.¹

§ 1751. Sect. 140 of the same Act deserves notice in this place; for, after enacting in subs. 1, that "all documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates, without further proof unless the contrary is shewn;"—it goes on to provide in subs. 2, that "a certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be *conclusive* evidence of the fact so certified."

§ 1752. With the view of facilitating the proof of such notices as under the Bankruptcy Act are required to be gazetted or advertised in local papers, the Registrar of each Court is empowered by r. 15, subs. 1 and 2, to file with the proceedings a memorandum² referring to and giving the date of each advertisement; and by subs. 4, this memorandum is made "prima facie evidence that the advertisement in question was duly inserted in the issue of the Gazette or paper to which the memorandum refers."

§ 1753. Passing now to other judicial documents, little need be said respecting their admissibility and effect. It has already been stated, that under the old system of pleading, *answers* in Chancery, and such *pleas* in Chancery as have been put in upon oath, are receivable against the party by whom they were sworn, as cogent admissions of the allegations which they contain;³ but that *demurrers* in equity are not so receivable, since *they* were merely hypothetical statements, which, *assuming* the facts to be as alleged, denied that the defendant was bound to answer.⁴ *Bills* in Chancery, whether

¹ See § 32, subs. 2; Bkptcy. Rules, 1883, F. 46.

² See Bkptcy. Rules, 1883, F. 128.

³ Ante, § 727.

⁴ Ante, § 828.

they were bills for relief or for discovery, are alike inadmissible, excepting to prove their own existence, or the institution of a suit, or that certain facts were in issue between the parties: their exclusion for other purposes resting upon the ground that they contained nothing more than mere suggestions of counsel, made for the purpose of obtaining an answer upon oath.¹ It seems to follow by a parity of reasoning, that under the old system, pleadings at common law are also inadmissible as evidence of the truth of the facts stated therein;² unless, indeed, they were such pleadings as required to be verified by affidavit.³

§ 1754.⁴ *Depositions*, though informally taken, are receivable, § 1561 like any other admissions, against the deponent whenever he is a party;⁵ or they may be used to contradict and impeach him, when he is afterwards examined as a witness.⁶ But before they will be available as secondary evidence, and as a substitute for *vivâ voce* testimony, they must be proved to have been regularly taken, under legal proceedings duly pending, or on some other occasion sanctioned by law;⁷ and, unless the case be provided for by statute, or by a rule of court, it must further appear, that the witness himself cannot be personally be produced.⁸ In some cases the depositions of deceased witnesses will be admissible even against strangers: as, for instance, if they relate to a custom, prescription, or pedigree, where reputation would be evidence; for, as the unsworn declarations of persons deceased would be here received, their declarations on oath are à fortiori admissible.

§ 1756. When an application has been refused at chambers, its § 1563 effect as a bar to any fresh summons will vary according to circumstances. If the words, “no order” be indorsed upon the summons,

¹ *Boileau v. Rutlin*, 2 Ex. R. 665; *Doe v. Sybourn*, 7 T. R. 3, per *Ld. Kenyon*; *Taylor v. Cole*, *id.* n.; ante, § 859.

² *Boileau v. Rutlin*, 2 Ex. R. 680, 681, per *Parke, B.*

³ See 15 & 16 V., c. 76, §§ 80, 81, now repealed.

⁴ *Gr. Ev.* §§ 552, 555, in part.

⁵ Ante, § 727.

⁶ Ante, §§ 1426, 1446, et seq.

⁷ Ante, § 464, et seq.

⁸ Ante, § 472, et seq.

the judge will, in general, be held to have pronounced no decision upon the merits, and the party who has failed, will consequently be allowed to make a second application; but if the indorsement be 'application dismissed,' this will be regarded as a judgment, which the applicant must move the court to rescind.¹

§ 1757. Where a person had applied to a Metropolitan Police Magistrate under the Act of 2 & 3 V., c. 71, § 40, for an order to deliver up certain goods of less value than £15, and such order, upon inquiry, had been refused, the court held that the applicant was not estopped by these proceedings from bringing an action of trover with respect to the same property.² So, a refusal by justices in petty sessions to make an order for maintenance of a bastard, cannot be given in evidence as a bar to a second application on the part of the mother, though the original summons has been heard on the merits; but the justices at the second hearing may take into consideration the fact of the former dismissal as a material element in guiding their judgment.³ Again, if an order in bastardy be drawn up in such a form as to be void in law, it cannot be a bar to a second summons in the same matter between the same parties, even though it has never been formally set aside on appeal.⁴ Neither, as it seems,⁵ will an order of quarter sessions, quashing an order of affiliation as being "bad in form," be regarded as a decision on the merits, so as to preclude the woman from applying to the petty sessions for a fresh order.⁶ But when, on appeal to quarter sessions, an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence,⁷ such order of quarter

¹ *R. v. Machen*, 14 Q. B. 73, per Erle, J.; *R. v. Herrington*, 3 New R. 468, Q. B.

² *Dover v. Child*, 45 L. J., Ex. 462; L. R., 1 Ex. D. 172, S. C.

³ *R. v. Machen*, 14 Q. B. 74; 18 L. J., M. C. 213, S. C.; *R. v. Grant*, 36 L. J., M. C. 89; 2 Law R., Q. B. 466, and 8 B. & S. 365, S. C., nom. *R. v. Gaunt*; 35 & 36 V., c. 65, § 4; 8 & 9 V., c. 10.

⁴ *R. v. Brisby*, 1 Den. 416.

⁵ *Ex p. Harrison*, 16 Jur. 726; 19 Law Times, 114, S. C.; *R. v. Glynne*, 7 Law Rep., Q. B. 21, 23, per Blackburn, J.

⁶ See, also, *R. v. May*, L. R., 5 Q. B. D. 382, which certainly carries the law to its extreme boundary; S. C. nom. *R. v. Essex, Js.*, 49 L. J., M. C. 67.

⁷ 8 & 9 V., c. 10, § 6.

sessions is final, and no further proceedings can be taken before justices.¹

§ 1758. The admissibility and effect of *awards* need not be discussed at any length. The decision of an arbitrator, who has been duly appointed, is as conclusive as the judgment of a competent tribunal upon the subject-matter referred to him;² and whether he be a professional or non-professional man,³ the court will not interfere with his award on the ground of any alleged error either in law or in fact, provided,⁴ first, that he has not exceeded, or fallen short of, the authority conferred upon him,⁵ next, that the award is final,⁶ and certain,⁷ and not admitted by the arbitrator to have been made under a mistake,⁸ and lastly, that it does not prescribe what is either illegal,⁹ or impossible. But an award, unlike a verdict or judgment, cannot be received as evidence in the nature of reputation;¹⁰ though it may occasionally be admissible, in conjunction with the submission to arbitration, as an act of ownership.¹¹ It may also be noted, as the point has been thought worthy of argument, that an award is not evidence of an account stated between the parties to the submission;¹² unless, perhaps, in the single event of there being no regular agreement to refer, and, consequently, no award capable of being enforced in law. In such a case, as the

¹ *R. v. Glynne*, 7 Law Rep., Q. B. 16; 41 L. J., M. C. 58, S. C.

² *Doe v. Rosser*, 3 East, 15; *Commings v. Heard*, 10 B. & S. 606; 4 Law Rep., Q. B. 669, S. C.; 39 L. J., Q. B. 9, S. C. nom. *Cummings v. Heard*. But see *Newall v. Elliot*, 1 H. & C. 797. See also, *Rhodes v. Airdale Drain. Com.*, 45 L. J., C. P. 337.

³ *Fuller v. Fenwick*, 3 Com. B. 705, 711, per Wilde, C. J.; *In re Brown & Croydon Can. Co.*, 9 A. & E. 526, per Ld. Denman.

⁴ *Toby v. Lovibond*, 5 Com. B. 784, per Wilde, C. J.; *Barrett v. Wilson*, 1 C. M. & R. 586; *Johnson v. Durant*, 2 B. & Ad. 925; *Phillips v. Evans*, 12 M. & W. 309.

⁵ *In re Stroud*, 8 Com. B. 518, per Maule, J.

⁶ *Bhear v. Harradine*, 7 Ex. R. 269.

⁷ *Williams v. Wilson*, 9 Ex. R. 90.

⁸ *Dinn v. Blake*, 44 L. J., C. P. 276.

⁹ *East Union Ry. Co. v. East. Cos. Ry. Co.*, 2 E. & B. 540, per Ld. Campbell; *Alder v. Savill*, 5 Taunt. 454.

¹⁰ *Evans v. Rees*, 10 A. & E. 151; 2 P. & D. 627, S. C.; *R. v. Cotton*, 3 Camp. 444; *Wenman v. Mackenzie*, 5 E. & B. 447; ante, § 626.

¹¹ *Brew v. Haren*, 1 R., 9 C. L. 29; S. C. Aff. on App. I. R., 11 C. L. 198.

¹² *Bates v. Townley*, 2 Ex. R. 152.

arbitrator is not a judge, he might possibly be deemed the agent of the parties for the purpose of settling their accounts.¹

§ 1759. The Act passed in 1857 for the establishment of the Court of Probate;² has extensively altered the law with respect to the admissibility and effect of probates, and of letters of administration with wills annexed. Formerly these documents were uniformly rejected, whether tendered as primary or as secondary evidence of the contents of a will, on the trial of any cause relating to real estate.³ The ecclesiastical tribunals by which they were granted had no control over devises of real property; and so absurdly jealous were the temporal courts of spiritual interference, that even when a will of lands was irretrievably lost, nothing would induce them to look at the probate,⁴ though had the inquiry related to personalty, such a document would have furnished conclusive evidence,⁵ and though they readily received the testimony of a witness, who undertook to state the contents of the will having heard it once read before the testator's family on the day of his funeral.⁶ This startling anomaly, after causing infinite injustice for a long series of years, has at length to a great extent been remedied. The Act of 1857⁷ first provides by § 61,⁸ that where a will affecting real estate is proved in solemn form, or is otherwise the subject of a contentious proceeding in the Probate Division, the heir, devisees, and other persons interested in the real estate shall, as a general rule, be cited to see proceedings, or to become parties.⁹ § 62¹⁰ then enacts, that "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise

¹ *Keen v. Batshore*, 1 Esp. 194, per Eyre, C. J.; commented on in *Bates v. Townley*, 2 Ex. R. 152.

² 20 & 21 V., c. 77; and 20 & 21 V., c. 79, Ir.

³ *Doe v. Calvert*, 2 Camp. 389, per Ld. Ellenborough.

⁴ *Id.*

⁵ *Allen v. Dundas*, 3 T. R. 125.

⁶ 2 Camp., 390, n., citing *Anon. case*, coram Wood, B.

⁷ 20 & 21 V., c. 77.

⁸ See corresponding enactment in the Irish Act, 20 & 21 V., c. 79, § 65.

⁹ See Reg. 78 of Rules of 1862 for Ct. of Prob. in contentious business, and Form, No. 4.

¹⁰ See corresponding enactment in the Irish Act, 20 & 21 V., c. 79 § 66.

declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a *copy thereof* respectively *stamped* with the *seal* of" [the Probate Division] "shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure, (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration,) be received as *conclusive evidence of the validity and contents of such will*, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons, against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." § 63¹ empowers the Probate Division, at its discretion, to proceed in any case without citing the heir or other persons interested in real estate; but it provides that the probate, decree, or order of the court shall not affect any such person, "unless he has been cited or made party to the proceedings, or derives title under or through a person so cited or made party."

§ 1760. Next comes a very important clause, for § 64² enacts, § 1565B that in any action "where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in

¹ See, also, 20 & 21 V., c. 79, § 67, Ir.

² See, also, 20 & 21 V., c. 79, § 68, Ir. There the intervals allowed for giving notice are respectively *seven* days, and *three* days, instead of *ten* days and *four* days, as in the English Act. See, further, 14 & 15 V., c. 57, § 108, Ir., as to a somewhat similar practice in the Civil Bill Courts, excepting that no notice is required to be given; and *Jackson v. Jackson*, Ir. Cir. R. 469.

proof such devise or other testamentary disposition to give the opposite party, *ten days* at least before the trial or other proceeding in which the said proof shall be intended to be adduced, *notice* that he intends, at the said trial or other proceeding, to give in evidence as proof of the devise or other testamentary disposition the *probate* of the said will, or the *letters of administration with the will annexed*, or a *copy thereof stamped with any seal of* "[the Probate Division]; "and in every such case such probate or letters of administration, or copy thereof respectively stamped as aforesaid, shall be *sufficient* evidence of such will and of its validity and contents, *notwithstanding the same may not have been proved in solemn form*, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within *four days* after such receipt, give *notice* that he disputes the validity of such devise or other testamentary disposition." § 65¹ enacts, that "in every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the court or judge, before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid."

§ 1761. In interpreting the above enactments the courts have § 1565c decided several points of some importance. And first, it seems clear, that the notice required need not specify the purpose for which the evidence is wanted.² Next, though the Act directs that the notice shall be given "to the opposite party," that direction will be satisfied by giving it to his solicitor or agent; and, indeed, under ordinary circumstances, this will be the more convenient course to pursue.³ Thirdly, in stating that the probate shall be "sufficient evidence" of the will, the Legislature is held to have meant, that, it shall be *prima facie*, as contradistinguished from conclusive, evidence.⁴ Fourthly, the stamp alluded to in the Act is

¹ See, also, 20 & 21 V., c. 79, § 69, Ir.

² Cope v. Mooney, 14 Ir. Law R., N. S. 256; Irwin v. Callwell, 12 id. 144.

³ Barraclough v. Greenhough, 36 L. J., Q. B. 251; 2 Law Rep., Q. B. 612, S. C.

⁴ Barraclough v. Greenough, 36 L. J., Q. B. 251; 8 B. & S. 623; and 2 Law Rep., Q. B. 612, per Ex. Ch., overruling S. C. in court below, as reported 36 L. J., Q. B. 26; 2 Law Rep., Q. B. 1; and 7 B. & S. 170.

not required for the probate or letters of administration, but only for the copy of those documents;¹ and lastly, notwithstanding the statute, a probate will not be evidenced to prove the appointment of testamentary guardians.²

§ 1762. The Act of 14 & 15 V., c. 105, contains the following remarkable clause respecting the admissibility and effect of orders made by the late Poor Law Board, or by the present Local Government Board,³ on questions touching the settlement, removal, and chargeability of paupers. § 12 enacts, that, "the guardians of any two unions or parishes, or the guardians of a union and the guardians of a parish, or the guardians of a union or parish and the overseers of any parish, or the overseers of any two parishes, between whom any question affecting the settlement, removal, or chargeability of any poor person shall arise, may, if they think fit so to do, by agreement in writing executed in respect of any guardians by sealing with their common seal, and in respect of overseers by the signatures of a majority of them, submit such question to the board for their decision; and the board may, if they see fit, entertain such question, and by an *order* under the *seal* determine the same; and every such order shall be in all courts, and for all purposes, final and conclusive between the parties submitting such question, as to the question therein determined."

§ 1763. Under the Stamp Act, 1870, the Commissioners of Inland Revenue are entrusted with important powers for *resolving doubts* respecting the amount of *stamp duty* payable on particular instruments. Subject to such regulations as they may make, and to an appeal to the Queen's Bench Division, they are required, at the instance of any person, to decide whether any executed instrument,—which term includes any signed document,⁴—submitted to them be chargeable with stamp duty or not, and if it be chargeable, they must fix the amount. They must then impress upon the

¹ *Rippon v. Priest*, 3 Fost. & Fin. 644, per Keating, J.

² *Cope v. Mooney*, 14 Ir. Law R., N. S. 256.

³ 34 & 35 V., c. 70, § 2.

⁴ 33 & 34 V., c. 97, § 2, subs. 4 & 7.

document a particular stamp, *denoting* either that no duty is chargeable, or that the proper duty has been paid; and in either event, the document so stamped "shall be admissible in evidence, and available for all purposes, notwithstanding any objection relating to duty."¹ Although the adjudication of the commissioners under these provisions operates as a judgment in rem, and is conclusive on strangers as well as on parties, it must be pronounced before objection has been taken to the reception of the document in evidence; and, consequently, where a bond had been rejected at the trial as insufficiently stamped, the court held that the objection was not removed, though the commissioners afterwards, but before the question was argued in Banc, had affixed upon the document a denoting stamp.²

§ 1764. It is not easy to lay down any precise rule as to how far *judicial documents* will be evidence of the *facts recited* in them. § 1568
Under the Trustee Act, 1850, all orders which are made by the Lord Chancellor in Lunacy, or by the Chancery Division of the High Court, for the purpose of conveying or assigning lands, or of releasing or disposing of contingent rights, and which are founded on allegations respecting the incapacity, absence, survivorship, death, or intestacy of any trustee or mortgagee, are rendered *conclusive evidence* of the matters contained in such allegations, in any court upon any question as to the legal validity of any such order.³ On the other hand, a partition order made under the now repealed⁴ Irish Incumbered Estates Act,⁵—though per se conclusive evidence that the court had jurisdiction to make it, that all necessary parties were present, that a proper petition was presented, and that due application was made,—furnishes no proof whatever with respect to the title of the parties, who are stated in it to have been the owners of the undivided shares in the property;⁶ neither is such an order any evidence of the deeds, wills, or other documents recited therein.⁷

¹ 33 & 34 V., c. 97, §§ 18, 19.

² Prudential Mutual Assur. Assoc. v. Curzon, 8 Ex. R. 97.

³ 13 & 14 V., c. 60, § 44.

⁴ By 38 & 39 V., c. 66.

⁵ 12 & 13 V., c. 77, § 43, Ir.

⁶ Blake v. Jennings, 12 Ir. Law R., N. S. 458; 12 & 13 V., c. 77, § 49, Ir.

⁷ Id.

§ 1765. It seems that the existence of a warrant of attorney cannot be proved, so as to render its production unnecessary, by putting in a rule of court setting it aside.¹ But, on the other hand, the production of a writ of supersedeas has on more than one occasion been deemed sufficient evidence both of the issuing of the fiat against a bankrupt, and of the fact of such fiat having been superseded.² It has also been held, that a warrant of commitment, in like manner with a conviction,³ is evidence to a certain extent of the facts which it recites; and therefore, in an action against a justice for false imprisonment, if the warrant put in by the plaintiff recites the information on oath on which it purports to have been founded, such recital will relieve the defendant from the necessity of formally proving the information.⁴ § 1569

§ 1766. The effect of a writ of fieri facias as evidence varies according to circumstances. If an execution debtor bring an action against the sheriff for seizing his goods, the defendant may justify his conduct by producing the writ without any copy of the judgment; but if the action be brought by a stranger, both the writ and the judgment must be proved.⁵ The reason for this distinction seems to be, that in the former case, the plaintiff, having been a party to the original action, must be aware of the existence of the judgment, and might have moved to set it aside, if it be open to objection.⁶ The rule being once established, it applies as well to a case where the vendee of the sheriff is a party, as where it is the sheriff himself, and where he is plaintiff as well as where he is defendant.⁷ Perhaps, however, the rule does not apply, where the purchaser from the sheriff is the execution creditor.⁸ § 1570

¹ *Compton v. Chandless*, 4 Esp. 18, per Ld. Kenyon. See, also, *Yorke v. Brown*, 10 M. & W. 78.

² *Gervis v. Gd. West. Canal Co.*, 5 M. & Sel. 76; *Wright v. Colls*, 8 Com. B. 150.

³ Ante, § 1669, et seq.

⁴ *Haylock v. Sparke*, 22 L. J., M. C. 67; 1 E. & B. 471, S. C. This case seems to overrule *Stephens v. Clark*, 2 M. & Rob. 435, per Cresswell, J. See ante, § 728.

⁵ *Doe v. Murless*, 6 M. & Sel. 114, per Bayley, J.

⁶ Id.

⁷ Id.; ante, § 729.

⁸ *Doe v. Smith*, 2 Stark. R. 199.

§ 1767. The general admissibility of *inquisitions* rests upon the ground, that they contain the result of inquiries made under competent authority, concerning matters in which the public is interested.¹ As such, they are receivable even against strangers, though, as before observed, they are far from being conclusive evidence.² These documents, since the abolition of writs of right, and the passing of the modern statutes of limitation, have become of much less importance than they formerly were, as sources of evidence. They are still, however, occasionally of value, especially in matters of pedigree,³ in questions respecting the right of church patronage, or the existence or amount of a modus, and in peerage claims. § 1571

§ 1768. Among the most important of them may be mentioned *Domesday-book*,⁴ a work of which every one has heard, though few persons are aware of its contents. This book, which is the most ancient inquisition extant, was compiled a few years after the Conquest by commissioners, styled the Justiciaries of the King, upon the oaths of the sheriffs, the lords of the manors, the presbyters of every church, the reves of every hundred, and the bailiffs and six villans of every village. It contains a general survey of all the counties of England, except the four northern, and specifies the names and local position of each place; its possessor in the time of King Edward the Confessor; its possessor at the time of the survey; how many hides in the manor; how many carrucates in demesne; how many homagers, cotarii, servi, freemen, and tenants in socage; what quantity of wood, meadow, and pasture; what mills and fish-ponds; what the gross value in King Edward's time, and at the time of the survey; and how much each freeman or sockman had at these respective periods.⁵ If we are to believe § 1572

¹ 2 Ph. Ev. 95.

² Ante, § 1674.

³ See De Roos Peer., 2 Coop. 545.

⁴ Now deposited in the Record Office. See ante, § 1485. As to the mode of proving entries contained in it, see ante, § 1533.

⁵ Those who wish for further information on this subject are referred to Sir H. Ellis's *Introd. to Domesday*, in two vols.; Ingulphus, ed. Gale, pp. 79, 80; Brady, *Hist. of Eng.* 205—208; Miss Strickland's *Lives of Queens of Eng.*, vol. i., pp. 91—93.

Ingulphus, the learned Abbot of Croydon, the commissioners were not always remarkable for a strict impartiality;¹ but be this as it may, Domesday-book is not often available as practical evidence, owing to the frequent changes of name, which the hundreds and other places described in it have undergone since the eleventh century;² though it is only just to our antiquaries to state, that this defect has, to a certain extent, been remedied by their learned labours.

§ 1769. The Visitation Books, deposited at the Heralds' College, § 1573
—which contain the pedigrees and coats of arms of the nobility and principal gentry in England, and which were compiled during the 16th and 17th centuries by heralds, acting under commissions from the Crown,³—have on many occasions been admitted in evidence as official records to establish or defeat pedigrees and peerage claims;⁴ but in some cases, the House of Lords has first required the production of the commission under which the visitation was made.⁵ It appears that copies of these visitations have been uniformly rejected;⁶ though it is difficult to see on what ground, if the originals can be regarded as public official documents.⁷

§ 1769A. It may here be stated, as the question has recently been under the notice of the House of Lords, that the report of a committee appointed by a public department in a foreign State, though addressed to that department and acted on by the Govern-

¹ Ingulphus, ed. Gale, p. 79. His words are, “Isti penes nostrum monasterium benevoli et amantes, non ad *verum pretium* nec ad *verum spatium* monasterium librabant, misericorditer præcavescentes in futurum regiis exactionibus, et aliis oneribus, piissima nobis benevolentia providentes.”

² Sir A. Ellis's *Intro.* vol. i., p. 34.

³ Hubb. *Ev. of Suc.* 541, 542. See ante, § 657.

⁴ *Matthews v. Port*, Comb. 63; *Pitton v. Walter*, 1 Str. 162; *Leigh Peer.*, 1829, part 2, 138; *De Lisle Peer.*, Min. *Ev.* 12; *Tracy Peer.*, Min. *Ev.* 18.

⁵ Hubb. *Ev. of Suc.* 546, et seq., and cases there cited. See, also, *Shrewsbury Peer.*, 7 H. of L. Cas. 9, 27, 34.

⁶ *Matthews v. Port*, Comb. 63; *Ld. Thanet v. Forster*, T. Jones, 224; Hubb. *Ev. of Suc.* 548.

⁷ See, ante, §§ 1598, 1599. As to the admissibility of other books kept at the Heralds' College, see Hubb. *Ev. of Suc.* 538—566.

ment, is not necessarily admissible in the Courts here, as evidence of all the facts stated therein.¹

§ 1770. The Down Survey, which was made during the reign of Charles II., is rendered conclusive by statute² as to the boundaries of what are called “the old and new interests,” that is, of the lands apportioned between the aboriginal inhabitants of Ireland and the English and Scotch settlers; and it is also admissible in evidence as a public document on all questions between any persons respecting the matters stated in it.³ The Books of Distributions, too, though they are only abstracts of this famous survey, will be received in evidence, as having been compiled under public authority, and being preserved among the records of a public office.⁴ But the Ordnance Survey in Ireland, though notoriously drawn up with great care and accuracy, is not regarded by the courts of law as a public document, and it is consequently inadmissible.⁵ Still, surveys and maps, even when they cannot be treated as public documents, will occasionally be received in evidence, as admissions of persons in privity with those against whom they are tendered.⁶ § 1574

§ 1771. It here deserves notice that every order, made in Ireland by the Lord Lieutenant and Council under any of the modern statutes for defining the boundaries of Irish Counties and other divisions and denominations of land, is in itself “conclusive evidence of every fact and circumstance necessary to authorise the

¹ *Sturla v. Freccia*, L. R., 5 App. Cas. 623; 50 L. J., Ch. 86, in Dom. Pr. S. C. This case deserves attentive perusal, as containing several able judgments respecting an interesting branch of the law.

² 14 & 15 C. 2, c. 2, Ir.; 17 & 18 C. 2, c. 2, § 5, Ir.

³ *Abp. of Dublin v. Ld. Trimleston*, 12 Ir. Eq. R. 251; *Tisdall v. Parnell*, 14 Ir. Law R., N. S. 1.

⁴ *Poole v. Griffith*, 15 Ir. Law R., N. S. 239, 280; confirming *Knox v. Ld. Mayo*, 7 Ir. Eq. R., N. S. 563, per Napier Ch.; 9 Id. 199, 201, S. C.; and *Spaight v. Twiss*, 14 Ir. Law R., N. S. 516; and overruling on this point *Abp. of Dublin v. Ld. Trimleston*, 12 Ir. Eq. R. 251. See *Abp. of Dublin v. Ld. Trimleston*, as to when decrees of the Court of Claims are admissible.

⁵ *Swift v. M'Tiernan*, 11 Ir. Eq. R. 602, per Brady, Ch.; *Tisdall v. Parnell*, 14 Ir. Law R., N. S. 1, 27, 28, per Pigot, C. B.

⁶ *Earl v. Lewis*, 1 Esp. 1; *Pollard v. Scott*, Pea. R. 19; *Wakeman v. West*, 7 C. & P. 479; *Doe v. Lakin*, id. 481.

making thereof," and it must be taken to have been made in conformity with the provisions of the Acts.¹ It may also be conclusively proved by any copy "purporting to be certified as a true copy" by the clerk of the Priory Council, or by a printed copy published in the Dublin Gazette.² A copy, too, of any map referred to in any such order, or of any part of such map, purporting to be certified as a true copy by such clerk, is conclusive evidence of the original map or the part thereof of which it purports to be a copy.³

§ 1772. Old ecclesiastical *terriers*,—which are returns of the § 1575 temporal possessions of the church in every parish, made from time to time by virtue of the 87th canon, and deposited in the bishop's registry, or the registry of the archdeacon of the diocese, or occasionally, in the chest of the parish church,—are receivable in evidence, when proved to have come from the proper repository.⁴ Their admissibility appears to rest, partly, upon the official character of the statements they contain, but principally, upon the ground that they are admissions by persons, who stood in privity with the litigants.⁵ Returns made by the incumbents of livings in answer to queries sent to them by the bishop of the diocese, for the information of the Governors of Queen Anne's Bounty, will also be admissible in evidence, on the same principle as inquisitions, where the question relates to the rights of the Church.⁶

§ 1773. Copies of Court Rolls, and especially presentments of § 1576 manor courts, are,—as already pointed out,⁷—admissible in evidence, to prove either the customs or bounds of a manor, or any other matters of public and general interest connected with a manor, which are capable of being proved by evidence of reputation. Moreover, copies of court rolls, purporting to be surrenders of property by a person proved to be then in possession, and admittances accordingly, will, in an action by the surrenderee wherein

¹ 35 & 36 V., c. 48, § 2, Ir.

² § 3.

³ § 4.

⁴ 1 St. Ev. 238, 239; B. N. P. 248. The repository need not be the *most proper* place of deposit. See, ante, §§ 659, et seq., and *Croughton v. Blake*, 12 M. & W. 208.

⁵ 2 Ph. Ev. 120.

⁶ *Carr v. Mostyn*, 5 Ex. R. 69.

⁷ Ante, §§ 612, 613, 623.

his ownership is disputed, be good evidence of the existence of the manor, and of such property being within it.¹ As between surrender and surrenderee, a presentment of an admittance upon a surrender out of court is primary evidence of the surrenderee's title, without producing the original surrender.²

§ 1774.³ The principles on which *official registers* are entitled to credit have already been explained;⁴ and it is here only necessary to add, that they are admissible as competent evidence of the facts they contain, provided such facts be required by law to be recorded in them for the public benefit, and be necessarily within the knowledge of the registering officer. Thus, a marriage register is evidence, not only of the fact of the marriage, but of the time of its celebration; for both these facts must have been known to the clergyman making the entry, and it was his duty to state them correctly in the register.⁵ So, a register of baptism is evidence of that fact, and of its date; but it furnishes no proof of the age of the party, further than that he was born at such date, even though it state the day of his birth.⁶ Neither, taken *per se*, is it any evidence of the place where the child was born, although, if other circumstances be proved, as that the child at the time of baptism was very young, or had since been removed to the parish where the register was kept, or relieved by such parish while living beyond its limits, it may then, in connexion with these facts, afford presumptive evidence of the place of birth.⁷ It seems, too, that if the register contains a statement that the child was illegitimate, it may

§ 1577

¹ *Standen v. Christmas*, 10 Q. B. 135.

² *Doe v. Olley* 12 A. & E. 481. See, also, *Doe v. Hall*, 16 East, 208; *Doe v. Mee*, 4 B. & Ad. 617; *R. v. Thurscross*, 1 A. & E. 126.

³ Gr. Ev. § 493, in some part.

⁴ Ante, § 1591.

⁵ *Doe v. Barnes*, 1 M. & Rob. 386, 389, per Ld. Denman; 6 & 7 W. 4, c. 86, § 38, cited ante, p. 1368, n. 1; *R. v. Hawes*, 1 Den. 270. As to Quaker marriages, see 35 & 36 V., c. 10.

⁶ *R. v. Clapham*, 4 C. & P. 29, per Ld. Tenterden; *Burghart v. Angerstein*, 6 C. & P. 690, 696, per Alderson, B.; *Wißen v. Law*, 3 Stark. R. 63, per Bayley, J.

⁷ *R. v. North Petherton*, 5 B. & C. 508, 510; *R. Lubbenham*, 5 B. & Ad. 968; *R. v. St. Katharine*, id. 970, n. See *R. v. Crediton*, 27 L. J., M. C. 265.

be read as *some* proof of that fact, being regarded as evidence of the reputation in the parish.¹

§ 1775. Registers of births and deaths, under the Registration Act of 1836,² as amended by the "Births and Deaths Registration Act, 1874,"³ are not admissible in evidence at all, unless the entries purport to be signed in accordance with the prescribed rules. On proof, however, that the requirements of the Acts have been duly complied with, the entries, or certified copies of them, become evidence, not only of the births⁴ and deaths to which they relate, but of the place where these events occurred, whenever by the direction of the Registrar-General that fact has been added to the entry;⁵ but

§ 1577

¹ Cope v. Cope, 1 M. & Rob. 271, 276, per Alderson, J.

² 6 & 7 W. 4, c. 86, § 38, cited ante, p. 1368, n. 1.

³ 37 & 38 V., c. 88, § 38, enacts, that "an entry or certified copy of an entry of a birth or death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea.

"When more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth, unless such entry purports, (a.) if it appear that not more than twelve months have so intervened, to be signed by the superintendent registrar as well as by the registrar; or, (b.) if more than twelve months have so intervened, to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules. Where more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry made after the commencement of this Act of a death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules."

⁴ In the case *In re Wintle*, 9 Law Rep., Eq. 373, Ld. Romilly is reported to have held that a birth register was not evidence of the date of birth; but this ruling would be a dangerous precedent to follow implicitly.

⁵ 7 W. & 1 V., c. 22, § 8, enacts, that "it shall be lawful for the Registrar-General, if he shall think fit, to direct that the place of birth or death of any person, whose birth or death shall be registered under the said Act for register-

the register books kept under the Registration of Burials Act, 1864, are simply “evidence of the burials entered therein.”¹

§ 1775A. The Register of Patents,—which is kept at the Patent Office, and which contains “the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed,”—is *prima facie* evidence of any matters by “The Patents, Designs, and Trade Marks Act, 1883,” directed or authorised to be inserted therein.² The same law applies to the Register of Designs, and the Register of Trade Marks, which are respectively kept in the same office;³ and with respect to the Register of Trade Marks the Act further provides, that the registration of a person as proprietor of such mark shall, for the first five years, be *prima facie* evidence, and, after that date, be conclusive evidence, of his right to its exclusive use, subject to the provisions of the Act.⁴ It deserves notice, that the three Registers mentioned above must be deemed to include all similar registers, which have hitherto been kept under any repealed enactment.⁵

§ 1776. Again, the daily books of a public prison are good evidence to prove the time of a prisoner's commitment or discharge,⁶ but not the cause of his commitment.⁷ So, the log-book of a convoy man-of-war, transferred from the Admiralty to the Record Office,⁸ is evidence to prove the time of sailing and the general motions of the fleet.⁹ So, the books of the Sick and Hurt Office,

ing births, deaths, and marriages, shall be added to the entry, in such manner as the Registrar-General shall direct; and such addition, when so made, shall be taken to all intents to be part of the entry in the register.”

¹ 27 & 28 V., c. 97, § 5.

² 46 & 47 V., c. 57, § 23.

³ Id. §§ 55, 78.

⁴ Id. § 76.

⁵ Id. § 114.

⁶ *R. v. Aickles*, 1 Lea. 191.

⁷ *Salte v. Thomas*, 3 B. & P. 188.

⁸ See ante, § 1485.

⁹ *D'Israeli v. Jowett*, 1 Esp. 427; *Watson v. King*, 4 Camp. 275.

and the muster-books of the Navy Office, which are now under the custody of the Master of the Rolls,¹ are admissible to prove the death of a sailor, and the time when it occurred;² and the latter books may also be read to show what ship the sailor belonged to, and the amount of wages due to him.³ So, lighthouse journals have been admitted by the Court of Admiralty as official books, for the purpose of proving the state of the wind and weather as registered therein.⁴ In all these and similar cases, the register does not prove the identity of the parties there named with the parties in question; but that fact must be established by other proof, though slight evidence will in most cases suffice.⁵

§ 1777. Land-tax assessment are, it seems, admissible to prove § 1578 the assessment of the taxes upon the individuals and for the property therein mentioned; and, perhaps, they may be taken, in connexion with other facts, as some evidence of occupation or seisin.⁶ So, the valuation lists of property in the Metropolis are, for many purposes, conclusive evidence of the gross and rateable value of the hereditaments included therein, and of the fact that all requisite hereditaments have been inserted.⁷ So, the poor-law valuations in Ireland have been received on one or two occasions as some evidence of the value of the lands comprised in them;⁸ and indeed, they furnish sufficient statutory proof of the "annual value" of such

¹ See ante, § 1485.

² *Wallace v. Cook*, 5 Esp. 117; *R. v. Rhodes*, 1 Lea. 24; *Barber v. Holmes*, 3 Esp. 190. See *Heathcote's Divorce*, 1 Macq. Sc. Cas. H. of L. 277, where a log-book being produced to prove that an officer of the ship was at a certain place at a given time, the House of Lords required further evidence of that fact.

³ *R. v. Fitzgerald*, 1 Lea. 20; *R. v. Rhodes*, id. 24.

⁴ *The Marie das Dorias*, 32 L. J., Pr. Mat. & Adm. 163, per Dr. Lushington; *B. & Lush. Adm. R.* 27, S. C. nom. *The Maria das Dore*s.

⁵ *Birt v. Barlow*, 1 Doug. 170; *Bain v. Mason*, 1 C. & P. 202, 203, n.; *Barber v. Holmes*, 3 Esp. 190; *Wedgwood's case*, 8 Greenl. 75.

⁶ *Doe v. Seaton*, 2 A. & E. 170, 178; *Doe v. Arkwright*, id. 182, n.; 5 C. & P. 575; 1 N. & M. 731, S. C.; *Doe v. Cartwright*, Ry. & M. 62; 1 C. & P. 218, S. C.; *Ronkendorff v. Taylor*, 4 Pet. 349, 360.

⁷ 32 & 33 V., c. 67, § 45.

⁸ *Swift v. M'Tiernan*, 11 Ir. Eq. R. 602, per Brady, Ch.; *Welland v. Ld. Middleton*, id. 603, per Sugden, Ch. See 23 & 24 V., c. 4, § 9, Ir., ante, p. 1371, n. 4.

lands in all cases in which that question may be raised before the Civil Bill Court.¹ So, under "The Representation of the People Act, 1867,"² it has been held, that the rate-book is some, but not conclusive evidence of the "rateable value" of premises sufficient to qualify an occupier to be registered as a voter.³ So, the rate books of an Irish poor law union are *primâ facie*, but not conclusive, evidence of the liability of a person rated therein as immediate lessor.⁴ Again, the bank-books are admissible, and indeed the best evidence, to prove the transfer of stock.⁵ The books, too, kept by the Metropolitan Board of Works for consolidated stock,⁶ and the registers kept in pursuance of "The Colonial Stock Act, 1877,"⁷ are respectively evidence of all matters therein severally entered, and of the title of the owners of any such stock. So, some of the official documents relating to parliamentary or municipal elections are, under specified restrictions, rendered, by the Ballot Act, 1872, admissible in evidence of certain particulars.⁸ An entry in a vestry-book, stating the election of a treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of the election, and of its regularity.⁹ So, in an action for disturbing the plaintiff in the enjoyment of a pew, claimed in right of his messuage, an old entry in the vestry-book, signed by the churchwardens, stating that the pew had been repaired by a former owner of the messuage, under whom the plaintiff claimed, in consideration of his using it, was held to be evidence in support of the plaintiff's right, as having been made by the churchwardens within the scope of their official authority.¹⁰ But old entries in a vestry-book, made by a churchwarden apparently not in the

¹ 40 & 41 V., c. 56, §§ 31, 32.

² 30 & 31 V. c. 102, § 6, subs. 2.

³ *Cooke v. Butler*, 2 Hop. & Colt. 22.

⁴ *Castlebar Guardians v. Ld. Lucan*, 13 Ir. Law R., 44.

⁵ *Breton v. Cope*, Pea. R. 30; *Marsh v. Colnett*, 2 Esp. 665.

⁶ 32 & 33 V., c. 102, § 13.

⁷ 40 & 41 V., c. 59, § 17.

⁸ 35 & 36 V., c. 33, Sch. 1, Part 1, rr. 38—43, and Part 2, r. 64. See *R. v. Beardsall*, L. R., 1 Q. B. D. 452; 45 L. J., M. C. 157, S. C.

⁹ *R. v. Martin*, 2 Camp. 100; *Hartley v. Cook*, 5 C. & P. 441.

¹⁰ *Price v. Littlewood*, 3 Camp. 288, per Ld. Ellenborough. This case has been questioned by Ld. Blackburn in *Sturla v. Freccia*, L. R., 5 App. Cas. 646, in Dom. Proc.; 50 L. J., Ch. 97, S. C.

discharge of any public duty, and by which he was not charged himself, have been rejected.¹

§ 1778. Besides the instances given above, the Legislature has on § 1579 many occasions interposed, and expressly made official registers evidence. For instance, every register of a British ship, and every examined or certified copy of such register, is, by virtue of § 107 of the Merchant Shipping Act of 1854, receivable in evidence as *prima facie* proof of all matters contained or recited therein,² and consequently, of the fact that the ship registered as a British vessel,³ and of the ownership of such vessel.⁴ So, all entries made in any official log-book, as directed by the same Act, are receivable in evidence "in any proceeding in any court of justice, subject to all just exceptions."⁵ Again, in certain proceedings under "The Sea Fisheries Acts, 1868 and 1883," the register of sea-fishing boats furnishes "conclusive evidence that the persons registered at any date as owners of such a boat were at that date owners thereof, and that the boat is a British sea-fishing boat."⁶ Under "the Local Loans Act, 1875," the registers of nominal securities, which are provable by certified copies or extracts, are rendered "evidence of any matters authorised to be inserted therein."⁷ The registers too, of members, which are kept in pursuance of the Companies Act, 1862, are made *prima facie* evidence of any matters by that Act directed or authorised to be inserted therein;⁸ that is, they are evidence, among other particulars, of the names, addresses, and occupations of the members,—of the shares or amount of stock held by each member, distinguishing each share by its number,—of

¹ *Cooke v. Banks*, 2 C. & P. 478.

² 17 & 18 V., c. 104, § 107, and 18 & 19 V., c. 91, § 15, both cited ante, § 1604, n. 1. See *Myers v. Willis*, 17 Com. B. 77; 18 Com. B. 886, S. C.; *The Princess Charlotte*, B. & Lush. Adm. R. 75. See, also, *Leary v. Lloyd*, 29 L. J., M. C. 194; 3 E. & E. 178, S. C.

³ *R. v. Bjornsen*, L. & Cave, 545; 10 Cox, 74; 34 L. J., M. C. 180, S. C.

⁴ *Hibbs v. Ross*, 1 Law Rep., Q. B. 534; 35 L. J., Q. B. 193; and 7 B. & S. 655, S. C.

⁵ 17 & 18 V., c. 104, § 285. See §§ 280-284 of same Act; also *The Henry Coxon*, 47 L. J., Adm. 83; L. R. 3 P. D. 156, S. C.

⁶ 31 & 32 V., c. 45, § 24; 46 & 47 V., c. 22, § 8.

⁷ 38 & 39 V., c. 83, §§ 23, 24.

⁸ 25 & 26 V., c. 89, § 37.

the amount paid or agreed to be considered as paid on the shares of each member,—of the date at which the name of any person was entered in the register as a member,—and of the date at which any person ceased to be a member.¹ So, the registers of licenses granted in respect of the metropolitan public carriages, would seem, by statute, to be sufficient proof of all things therein contained.² So, where a licence has been granted in Ireland for the formation of an oyster bed, a copy of such licence, certified under the hand of the clerk of the peace with whom the original is lodged, is evidence that such licence was duly granted, and that all preliminary matters were rightly performed.³ So, the registers of copyrights are made “*prima facie* proof of the proprietorship or assignment of copyright or licence as therein expressed,” and, “in the case of dramatic or musical pieces, are *prima facie* proof of the right of representation or performance.”⁴

§ 1779. Under “The Contagious Diseases, Animals, Act, 1874,” § 1579A
 “An order of the Privy Council, or of a local authority, declaring a place or area to be an infected place or area, or a place or area, or a portion of an area, to be free from disease, or cancelling a declaration, shall be *conclusive* evidence to all intents of the existence or past existence or cessation of the disease, or of the error, and of any other matter whereon the order proceeds.”⁵

§ 1780. Again, certified copies of the memorials filed at the § 1580
 office of Inland Revenue by banking copartnerships, are receivable in evidence, “as proof of the appointment and authority of the public officers named in such account or return, and also of the fact, that all persons named therein as members of such corporations or copartnership, were members thereof at the date of such account or return.”⁶ If these memorials have not been filed within the

¹ 25 & 26 V., c. 89, §§ 25, 29.

² 6 & 7 V., c. 86, § 16, cited ante, § 1608, n. 4. See, also, 16 & 17 V., c. 112, § 12, Ir.

³ 29 & 30 V., c. 97, § 12, Ir.; 32 & 33 V., c. 92, § 14, Ir.

⁴ 5 & 6 V., c. 45, § 11, cited ante, § 1511, n. 4; 25 & 26 V., c. 68, § 5; and 7 & 8 V., c. 12, § 8.

⁵ 41 & 42 V., c. 74, § 28, subs. 5.

⁶ 7 G. 4, c. 46, §§ 4, 6; ante, § 1606.

time limited by the Act, they cannot be received in evidence;¹ and when they are admissible, they by no means preclude parties from having recourse to other proof of the facts contained in them.²

§ 1781. The admissibility of the *books of corporations* depends, § 1581 at common law, on the nature of the acts recorded. If these are obviously of a public character, and the entries have been made by the proper officer, they will be received in evidence either for or against the corporations;³ but if they relate to the private transactions of the corporate body, they will be admissible, except, perhaps, in actions between their own members.⁴ At common law, these books, whatever be the nature of the entries, can seldom be adduced by the corporation, in support of its own claims against a stranger;⁵ but by the statute law such books are not unfrequently rendered admissible. Thus, the minutes of all resolutions and proceedings of general meetings of the companies registered under the Companies Act, 1862, and of the directors or managers of such companies, provided they purport to be signed, either by the presiding chairman, or by the chairman of the next succeeding meeting, are *prima facie* evidence, not only of the facts therein entered, but of the meetings having been duly held and convened.⁶ The Elementary Education Act, 1870, contains similar provisions with respect to the minutes of meetings held by a school board under that statute.⁷ So, the registers of shareholders in companies sub-

¹ Prescott v. Buffery, 1 Com. B. 41.

² Edwards v. Buchanan, 3 B. & Ad. 788; R. v. Carter, 1 Den. 65.

³ R. v. Mothersell, 1 Str. 93; Thetford's case, 12 Vin. Abr. 90, pl. 16; 2 Camp. 101, n.

⁴ Marriage v. Lawrence, 3 B. & A. 144; Gibbon's case, 17 How. St. Tr. 810.

⁵ London v. Lynn, 1 H. Bl. 214, n. s.; Corp. of Waterford v. Price, 9 Ir. Law R. 310; Com. v. Woelper, 3 Serg. & R. 29; Highland Turnp. Co. v. McKean, 10 Johns. 154.

⁶ 25 & 26 V., c. 89, § 67, cited ante, § 1596, n. 2. See § 154 of the same Act, which enacts, that "where any company is being wound up, all books, accounts, and documents of the company, and of the liquidators [appointed under the Act], shall, as between the contributors of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded." See, also, Fox's case, re Moseley Green Coal & Coke Co. Lim., 3 De Gex, J. & S. 465.

⁷ 33 & 34 V., c. 75, § 30, subs. 4.

ject to the provisions of the Companies Clauses Consolidation Act, furnish *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares, in all actions for calls brought by the company.¹ Parliament having, in the above instances, disregarded the common-law rule, which prohibits a man from producing his own books as evidence for himself, the courts will take care, before they permit a company to avail itself of such an exceptional privilege, that the provisions of the statute conferring the privilege have been strictly complied with.² Besides these examples, a great variety of semi-public books and documents might be mentioned, the admissibility and effect of which depend upon special legislative enactment; but as the most important of these have already been incidentally noticed while discussing the mode of proving public documents, it is not deemed expedient again to advert to them.

§ 1782. A *rule of law* of some practical value has of late years § 1582 been established respecting the *mode of signing books*, which contain entries of the proceedings of commissioners, directors of companies, public trustees, and the like, at their general meetings. By a great variety of statutes, such books are rendered admissible as evidence of the proceedings entered in them; but it not unfrequently happens that the Act contains a clause directing the chairman to subscribe his name to the minutes at each meeting. Notwithstanding this clause, the courts have held, that the fact of the signature being attached *at the meeting*, is not a condition precedent to the admissibility of the entry, provided it has been signed at some future time by the person who actually presided as chairman.³

¹ 8 & 9 V., c. 16, § 28. See *Waterford Ry. Co. v. Wolsely*, 1 Ir. Law R., N. S. 444.

² *Bain v. Whitehaven & Furness Junct. Ry. Co.*, 3 H. of L. Cas. 22, per Ld. Brougham; *Birkenhead, Lanc. & Chest. Junct. Ry. Co. v. Brownrigg*, 4 Ex. R. 426; *Lond. & N. W. Ry. Co. v. McMichael*, 5 Ex. R. 855; *West Cornwall Ry. Co. v. Mowatt*, 15 Q. B. 521. See *Inglis v. Gt. North. Ry. Co.*, 1 Macq. Sc. Cas. H. of L. 112, 117, 118; *Waterford, Wexf. Wickl. & Dubl. Ry. Co. v. Pidcock*, 8 Ex. R. 279.

³ *Southampton Dock Co. v. Richards*, 1 M. & Gr. 448; *Miles v. Bough*, 3 Q. B. 845; 3 G. & D. 119, S. C.; *In re Jennings*, 1 Ir. Eq. R., N. S. 236. See 33 & 34 V., c. 75, § 30, subs. 4. See, also, *Inglis v. Gt. North. Ry. Co.*, 1 (4387)

Considering the loose manner in which the directions contained in local and personal Acts are usually followed, this ruling has at least the advantage of being highly convenient; and regarded in that light, it was, in the year 1873, and again in the year 1882, almost entirely adopted by the Legislature, in the enactments respectively passed for facilitating the proof of proceedings of Municipal Corporations.¹

§ 1783. Section 22 of the last-mentioned Act enacts, in subs. 5, that "a minute of proceedings at a meeting of the council, or of a committee, signed at the same or *the next* ensuing meeting, by the mayor, or by a member of the council, or of the committee, describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof;" and subs. 6 further enacts, that "until the contrary is proved, every meeting of the council or of a committee, in respect of the proceedings whereof a minute has been so made, shall be deemed to have been duly convened and held, and all the members of the meeting shall be deemed to have been duly qualified; and, where the proceedings are proceedings of a committee, the committee shall be deemed to have been duly constituted, and to have had power to deal with the matters referred to in the minutes." "The Public Health Act, 1875," contains two similar clauses, and extends this facility of proof, not only to minutes of proceedings at meetings of local boards, committees, or joint boards, but to "*copies of any orders made or resolutions passed*" at such meetings.²

§ 1784. While treating of the mode of proving certificates, reference has been made to a considerable number of those docu- § 1583

Macq. Sc. Cas. H. of L. 112, in which it was held, that, where a meeting of a Scotch Railway Company's Finance Committee was adjourned, it was sufficient that the *minutes* of the *adjourned* meeting were signed, though § 101 of 8 & 9 V., c. 17, requires that "*every entry* shall be signed by the chairman of such meeting."

¹ 36 & 37 V., c. 33, § 3; 45 & 46 V., c. 50, § 22, subs. 5 & 6. The former of these Acts is now repealed by the latter.

² 38 & 39 V., c. 55, Sch. 1, Rule 1, sub-rule 10, and Rule 2, sub-rule 8. As to the minutes of meetings of creditors in bankruptcy, see ante, § 1552.

ments which are rendered by statute admissible evidence of the particular facts certified therein.¹ To these no further allusion is necessary; but with respect to certificates generally,² it may be observed that, at common law, a certificate of a mere matter of fact, not coupled with any matter of law, cannot be received as evidence, even though given by a person in an official situation.³ If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated. But as to matters which he was not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person, and will therefore be rejected.⁴ So, where an officer's certificate is made evidence by statute of certain facts, he cannot extend its effect to other facts, by stating those also in the certificate; but such parts of the certificate will be suppressed.⁵ Even the certificate of the Sovereign, under the sign-manual, cannot be received.⁶ § 1584

§ 1784A. In violation of the law as stated in the last section, the judge of the Probate Division has, on two occasions, apparently held, that the certificate of the ambassador in England of a foreign country, bearing the seal of the legation, was admissible to prove the law of that country.⁷ It seems, however, that in neither of these cases was the point argued, and probably the learned judge felt at liberty to act with some laxity, as the mere question for him to determine was, whether or not he would grant letters of administration to a foreigner, limited to the property of the deceased in England.

§ 1785.⁸ *Books and chronicles of public history* may be here § 1585

¹ Ante, § 1610, et seq.

² Gr. Ev. § 498, in part.

³ *Omichund v. Barker*, Willes, R. 549, 550.

⁴ *Sewell v. Corp.*, 1 C. & P. 392; *Drake v. Marryat*, 1 B. & C. 473; *Roberts v. Eddington*, 4 Esp. 88; *Waldron v. Coombe*, 3 Taunt. 162; 2 Ph. Ev. 125; *R. v. Sewell*, 8 Q. B. 161; *Oakes v. Hill*, 14 Pick. 442, 448; *Wolfe v. Washburn*, 6 Cowen, 261; *Jackson v. Miller*, id. 751; *U. S. v. Buford*, 3 Pet. 12, 29.

⁵ *Johnson v. Hocker*, 1 Dall. 406, 407; *Governor v. Bell*, 3 Murph. 331; *Governor v. Jeffreys*, 1 Hawks, 207; *Stewart v. Alison*, 6 Serg. & R. 324, 329.

⁶ *Omichund v. Barker*, Willes, R. 550.

⁷ In the goods of Prince Peter Oldenburg, 53 L. J., P. D. & A. 46; In the goods of Klingeman, 3 Swab. & Trist. 18; 32 L. J., P. M. & A. 16, S. C.

⁸ Gr. Ev. § 497, in part.

mentioned, as partaking in some degree of the nature of public documents, and as being entitled, on the same principle, to a certain degree of credit. Any approved public and general history, therefore, is admissible to prove ancient facts of a public nature, and the general usages and customs of this or of any foreign country.¹ But in regard to matters not of a public and general nature, such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a county, and the like, they are not admissible.² A fortiori, peerages, navy lists,³ clergy lists, court guides, directories, university calendars, and other non-official publications of a similar nature, cannot be received in evidence, however useful they may be to the genealogist, in aiding his researches, and directing him to the sources from which the information contained in them was derived.⁴

¹ B. N. P. 248, 249; case of Warren Hastings referred to by Ld. Ellenborough, in Picton's case, 30 How. St. Tr. 492; 2 Ph. Ev. 123; Ld. Bridgewater's case, cited Skin. 15; *Morris v. Harmer*, 7 Pet. 554; Ld. Brounker v. Atkyns, Skin. 14; St. Catherine's Hospital case, 1 Vent. 151; *Neale v. Fry*, cited 1 Salk. 281; S. C. nom. *Neal v. Jay*, cited 12 Mod. 86; S. C. nom. *Lady Ivy & Neal's case*, cited Skin. 623. In each of the three last-named reports, it is distinctly stated that certain Chronicles were admitted in that case to prove on behalf of the plaintiff that King Philip did *not* assume the style of King of Spain before a certain time; but on turning to *Mossom v. Ivy*, 10 How. St. Tr. 555, which seems to be the same case, no Chronicles appear to have been offered in evidence for such a purpose. A history, indeed, was tendered by the defendant to prove when Charles the Fifth resigned, but this was rejected by Jeffreys, C. J., who, after styling the book in his characteristic manner, "a little lousy history," asked, with evident irritability, "Is a printed history, *written by I know not who*, an evidence in a court of law?" p. 625. It is impossible to reconcile these conflicting reports. See *Pea. Ev.* 82, 83.

² *Steyner v. Droitwich*, Skin. 623; 1 Salk. 281; 12 Mod. 85, S. C.; *Piercy's case*, T. Jones, 164; *Lee Peer.*, Min. Ev. 155; *Evans v. Getting*, 6 C. & P. 586, per Alderson, B.; 2 Ph. Ev. 123, 124; *Hubb. Ev. of Suc.* 699—701.

³ Army lists are admissible, see ante, § 1638A.

⁴ *Marchmont Peer.*, Min. Ev. 62, 77; *Hubb. Ev. of Suc.* 700—703. As to "Medical Registers," see ante, § 1638; and as to "Law Lists," see ante, § 1639.

CHAPTER V.

PRIVATE WRITINGS.

§ 1786.¹ The only class of *written Evidence* which remains to § 1586
be considered, is that of PRIVATE WRITINGS. In the discussion
of this subject, it is not intended to mention separately each de-
scription of document² comprised in this class; but to state the
principles which govern the *inspection, production, proof, admissi-*
bility, and effect of them all. And, first, as to the means of ob-
taining *before or at the hearing* an INSPECTION or copy of such
documents as are referred to either in the *pleadings* or in the *affi-*
davits of the adverse party. Here it will be remembered that
under Order XIX, Rule 21, of the Rules of the Supreme Court, 1883,
“wherever the contents of any document are material, it shall be
sufficient in any pleading to state the *effect* thereof as *briefly* as
possible, without setting out the whole or any part thereof, unless
the precise words of the document or any part thereof are material.”
Now this rule, though highly valuable as affording a check to
needless prolixity in pleadings, is obviously, when standing alone,
open to the objection that it affords facilities for shrouding inten-
tions, and taking opponents by surprise. Under its protecting in-
fluence, the subtle draughtsman would soon adopt as his cardinal
maxim the bugbear of the Roman bard, “*brevis esse laboro, ob-*
scurus fio,” and would treat pleading, like diplomatic speech, as the
means of concealing thoughts and purposes. It became necessary
therefore to counteract this evil, and the way that object has been
attained in Order XXXI.

§ 1787. Rule 15 of that Order provides, that “every party to a

¹ Gr. Ev. § 557, in part as to first six lines.

² But see *West of Eng. Bk. v. Canton Ins. Co.*, L. R., 2 Ex. D. 472; and
China St. Ship Co. v. Comm. Ass. Co., L. R., 8 Q. B. D. 142; 51 L. J., Q. B.
132, S. C., as to the discovery of documents relating to marine insurance.

cause or matter shall be entitled, *at any time*, by notice in writing,¹ to give notice to any other party, in whose *pleadings* or *affidavits* reference is made to any document, to produce such document for the *inspection* of the party giving such notice, or of his solicitor, and to permit him or them to take *copies* thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse, which the court or judge shall deem sufficient, for not complying with such notice; in which case the court or judge may allow the same to be put in evidence, on such terms as to costs, and otherwise, as the court or judge shall think fit."

§ 1788. Rule 17 provides, that "the party to whom such notice is given shall, within *two* days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13,² or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within *four* days from the receipt of such notice, deliver to the party giving the same a notice³ stating a time within *three* days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected

¹ Form 9, Appendix B., is as follows:—

"188 [Here put the letter and number].

"In the High Court of Justice.

— Division.

Notice filed . . . , 188 .

A. B. v. C. D.

Take notice that the [*plaintiff* or *defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim*, or *defence*, or *affidavit*, dated the . . . day of . . . A. D. . .].

Describe documents required.

X. Y., Solicitor to the"

To Z., Solicitor for"

² See post, § 1800A.

³ Form 10 is as follows:—

"In the High Court of Justice.

— Division. A. B. v. C. D.

Take notice that you can inspect the documents mentioned in your notice
(4392)

at the *office of his solicitor*, or in the case of banker's books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which, if any, of the documents he *objects to produce*, and *on what ground*."

§ 1789. Rule 18 provides, that if the party served with a notice to inspect "omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor,¹ the judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit."² This application does not require to be supported by affidavit,³ and the judge who hears it may either make an immediate order or reserve the question.⁴ He will not, however, interfere, unless he be first satisfied that the applicant has complied with Rule 15, which requires the notice to be given in a certain form.⁵ When due application has been made by the one side and disregarded by the other, the order for immediate production will be made, almost as of course, unless some special reason against it can be shown;⁶ and the fact that a statement of defence has not been delivered by the applicant will not justify the court in rejecting his motion.⁷ Still, a claim of privilege against the production of documents on any substantial ground is not lost, merely by their being referred to in the pleadings or the affidavits.⁸

of the day of A.D. [*except the deed numbered*
in that notice] at [*insert place of inspection*] on Thursday next, the
instant between the hours of twelve and four o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of , A.D. on the ground that [*state the ground*]."

¹ There is an obvious omission in this rule. See R. 17, cited in last preceeding section.

² See *Prestney v. Corp. of Chester*, L. R., 24 Ch. D. 176, per Ct. of App.; 52 L. J., Ch. 346, 877, S. C. ³ Rule 18. See post, § 1807.

⁴ See Rule 20, cited post, § 1807. See, also, as to the mode of enforcing the order, Rules 22 & 23, cited post, § 1808.

⁵ See Form 9, cited ante, § 1787, n. 1.

⁶ In re the Credit Co. Lim., 48 L. J., Ch. 221, per Hall, V.-C.; L. R., 11 Ch. D. 256, S. C.

⁷ *Quilter v. Heatly*, L. R., 23 Ch. D. 42, per Ct. of App.; overruling a dictum by Denman, J., in *Webster v. Whewall*, L. R., 15 Ch. D. 120; 49 L. J., Ch. 704, S. C.

⁸ *Roberts v. Oppenheim*, L. R. 26 Ch. D. 724, per Ct. of App.

§ 1790. As the power of giving notices to inspect without the intervention of the court would afford an easy means of swelling costs and of harassing opponents, it has been deemed necessary to control that power by the aid of the taxing master, and a Rule has consequently been framed,¹ which provides, that "no allowance is to be made for any notice or inspection, unless it is shown, to the satisfaction of the taxing officer, that there were *good and sufficient reasons* for giving such notice and making such inspection." It is no easy matter to state *à priori*, what should be deemed "good and sufficient reasons" within the meaning of the above Rule, but when these applications used to be made at chambers, it was thought advisable, though it was not necessary, to support them by the affidavit of the party stating the special circumstances which rendered the inspection necessary; as, for instance, that he had no recollection of ever having executed such an instrument, or that he had reason to believe that it had been altered since it was signed, or the like.² The costs of the inspection were in general allowed to fall on the party seeking it;³ but those costs, as well as the costs of the application, were sometimes regarded as costs in the cause.⁴ If it appeared that the object of the defendant in seeking an inspection was vexatious, the judge would not entertain the application.⁵ Neither would he interfere, so as to enable the defendant to fish out a defence, although he would grant an inspection for the purpose of pleading a particular plea.⁶

§ 1791. As the rules just cited are exclusively confined to documents to which reference is made in the *pleadings* or *affidavits* of the litigants, it becomes necessary to explain what steps should be taken, when the production or inspection of other documents relating

¹ Ord. LXV., R. 27, subs. 17.

² *Woolmer v. Devereux*, 2 M. & Gr. 758; 9 Dowl. 672, S. C., nom. *Woolner v. Devereux*.

³ *Rep. of Peru v. Weguelin*, 41 L. J., C. P. 144; 7 Law Rep., C. P. 352, S. C.

⁴ Compare *Hill v. Philp*, 7 Ex. R. 232; and *Stilwell v. Ruck*, 4 H. & N. 468.

⁵ *Beal v. Bird*, 2 D. & R. 419.

⁶ *Birmingham Brist. & Thames J. Ry. Co. v. White*, 1 Q. B. 286—288.

to any cause or matter is required. The practice on this subject is now embodied in several Rules of Order XXXI. The most important of these is Rule 14, which,—substantially re-enacting § 18 of the Chancery Procedure Act of 1852,¹ together with the judicial interpretation which its terms have received in the interval,²—provides, that “it shall be lawful for the court or a judge, *at any time during the pendency* of any cause or matter, to order the *production* by any party thereto, *upon oath*, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge shall think right; and the court may deal with such documents when produced, in such manner as shall appear just.” In acting under this rule,—which, in common with all the other Rules relating to Discovery and Inspection, to be found in Order XXXI., does not apply to criminal proceedings, or to proceedings on the Crown side, or the Revenue side, of the Queen’s Bench Division, or to proceedings for divorce or other matrimonial causes,³—the judge has *no discretion* as to refusing to allow the inspection, unless the documents fall within some known rule of protection or privilege acted upon by the old Court of Chancery.⁴

§ 1793. It becomes, then, necessary to consider under what § 1603 circumstances that court was wont to enforce the production of papers. And here it may be generally observed, that, while it recognized no distinction between public and private documents, or between deeds and other less formal writings,⁵ it would seldom if ever,⁶—unless specially empowered by the legislature,⁷—interfere, where the discovery sought would, as stated by the defendant on

¹ 15 & 16 V., c. 86, now repealed by 44 & 45 V., c. 59.

² *Bustros v. White*, 45 L. J., Q. B. 643, per Jessel, M. R.

³ See Ord. LXVIII.

⁴ *Bustros v. White*, 45 L. J., Q. B. 642, per Ct. of App.; S. C., but not nearly so well reported, and with a misleading marginal note, L. R., 1 Q. B. D. 423. This case virtually overrules *Lane v. Gray*, 16 Law Rep., Eq. 552; 43 L. J., Ch. 187, S. C.

⁵ Wigr. Disc. § 400.

⁶ *Webb v. East*, L. R., 5 Ex. D. 23. “In every such case the objection must be taken by the party himself, and be supported by his oath,” per Kelly, C. B., in *Id.* p. 24; S. C. on app., L. R., 5 Ex. D. 108; 49 L. J., Ex. 250.

⁷ See ante, § 1456.

oath,¹ subject him to any criminal proceeding, penalty, or forfeiture,² or would violate the rules which relate to professional privilege.³ Subject to these exceptions,⁴ any party to an action, whether he were plaintiff or defendant,⁵ was entitled to exact from his opponent a discovery of the evidences, and therefore to inspect and take copies⁶ of the writings, which related either to his case alone,⁷ or to his case as well as to that of his opponent.⁸ He was also entitled to a discovery of everything which might enable him to defeat the case or title that he expected his opponent to set up;⁹ and he had a further right to know what that case or title was;¹⁰ but still he had no right whatever to a discovery of the evidences,¹¹ or to an inspection of the writings, which either related exclusively to his adversary's case;¹² or were not material to the issues to be tried.¹³

¹ Webb v. East, ante, p. 1523.

² Ante, §§ 1453—1458, 1464; Wigr. Disc. §§ 127—147, 442. See Hill v. Campbell, 44 L. J., C. P. 97; 10 Law Rep., C. P. 222, S. C.; Atherley v. Harvey, 46 L. J., Q. B. 518; L. R., 2 Q. B. D. 524, S. C.

³ Ante, § 911, et seq.; Wigr. Disc. §§ 136—138, 442; Bristol, May. of, v. Cox, L. R. 26 Ch. D. 678, per Pearson, J.

⁴ In the case of the Don Francisco, 1 Lush. Adm. R. 468; 31 L. J., Pr. Mat. & Adm. 205, S. C., a further exception was sought to be introduced by a party who objected to produce letters, on the ground that their production would divulge the *secrets of his trade*. This objection, however, was very properly overruled.

⁵ Wigr. Disc. § 87.

⁶ Pratt v. Pratt, 51 L. J., Ch. 838, per Bacon, V.-C.

⁷ Wigr. Disc. §§ 23, 26, 284.

⁸ Smith v. D. of Beaufort, 1 Hare, 520; 1 Phill. 220, S. C.; Burrell v. Nicholson, 1 Myl. & K. 680; Earp. v. Lloyd, 3 Kay & J. 549; Jenkins v. Bushby, 35 L. J., Ch. 400; 2 Law Rep., Eq. 547, S. C.; Bolton v. Corp. of Liverpool, 1 Myl. & K. 88; Att.-Gen. v. Lambe, 3 Y. & C., Ex. 162; Wigr. Disc. §§ 325, 367; Combe v. Corp. of London, 1 Y. & C., Ch. 631; 15 L. J., Ch. 80, S. C.; Att.-Gen. v. Emerson, 52 L. J., Q. B. 67; L. R., 10 Q. B. D. 191, S. C., per Ct. of App.; Att.-Gen. v. Thompson, 8 Hare, 106; Stainton v. Chadwick, 3 M. & Gord. 575; 13 Beav. 320, S. C. See Gomm v. Parrott, 26 L. J., C. P. 279; 3 Com. B., N. S. 47, S. C.

⁹ Att.-Gen. v. Corp. of London, 2 Hall & T. 1, 11—18; 2 M. & Gord. 247; 12 Beav. 8, S. C.; Stainton v. Chadwick, 3 M. & Gord. 575; 13 Beav. 320, S. C.

¹⁰ Id.

¹¹ Comm. of Sew. of Lond. v. Glass, 42 L. J., Ch. 345, per Ld. Romilly.

¹² Bolton v. Corp. of Liverpool, 1 Myl. & K. 88, 92; 3 Sim. 467, S. C.; Smith v. D. of Beaufort, 1 Hare, 520; 1 Phill. 220, 221, S. C.; Glover v. Hall, 2 Phill. 484; Ingilby v. Shafto, 32 L. J., Ch. 807, per Romilly, M. R.; 33 Beav. 31, S. C.; Owen v. Wynn, L. R., 9 Ch. D. 29, per Ct. of App.; Bristol, May. of, v. Cox, L. R. 26 Ch. D. 678, 684, per Pearson, J.

¹³ Wigr. Disc. §§ 224—237; Heugh v. Garrett, 44 L. J., Ch. 305.

1793A. "The rules which relate to professional privilege" referred to in the last section have been illustrated at some length in an earlier part of this Work,¹ but it may still be deemed advisable to draw attention to the recent case of *Wheeler v. Le Marchant*,² as the subject was there discussed with much ability by the Lords Justices of Appeal. The question raised was whether, in an action for specific performance of an agreement to grant a building lease to the plaintiff, the defendants were bound to produce letters in their custody, which had passed between their solicitors and their surveyors in relation to the property in question before any dispute had arisen between the parties. The order for production was granted by the court, and the remarks which fell from the Master of the Rolls in giving judgment deserve especial attention.³ "The actual communication to the solicitor by the client," said his lordship, "is of course protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, or whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation.⁴ So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected, though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It

¹ Ante, § 911, et seq.

² L. R., 17 Ch. D. 675; 50 L. J., Ch. 793, S. C.

³ L. R., 17 Ch. D. 682; and 50 L. J., Ch. 795.

⁴ Cited with approbation by Baggallay, L. J., in *Kennedy v. Lyell*, L. R., 23 Ch. D. 400.

appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants."

§ 1794. No valid objection can be taken to an order for the production of memoranda, which are admitted by the defendant to relate to the matters in dispute, and to be in his possession, on the ground either that he has a lien upon them,¹ or that they are intermingled with other entries in the same book, to a discovery of which the plaintiff is not entitled, and which cannot be separated or sealed up.² In the case of *Luscombe v. Steer*,³ a defendant was ordered to produce the whole of an agreement, though in his affidavit he had set out only two clauses of it, and had sworn that they alone assisted the plaintiff's case, or related to the matter in dispute. But where a document,—such, for example, as a pedigree,—consists of several separate parts, some of which relate to the question at issue, while others do not, the party producing the document is not bound to show the whole of it, but he will be allowed to close up or conceal such portions as he can undertake to swear are wholly irrelevant.⁴

§ 1795. Although the new Rules for regulating inspection and discovery are based on the practice which prevailed in the old Court of Chancery prior to the passing of the Judicature Acts, it may still be advantageous to refer shortly to a few of the leading decisions on those subjects, which the Common Law Courts have of late years pronounced. And here it was never deemed necessary that the inspection should be demanded exclusively with the view of establishing the original case of the applicant; but the court would always entertain the motion, if the object were to obtain material evidence to answer the opponent's case.⁵ Where, therefore, to an

¹ *Lockett v. Cary*, 3 New R. 405, per Romilly, M. R.; *Pratt v. Pratt*, 51 L. J., Ch. 838, per Bacon, V.-C.

² *Carew v. White*, 5 Beav. 172.

³ 37 L. J., Ch. 119.

⁴ *Kettlewell v. Barstow*, 41 L. J., Ch. 718, per Lds. Js.; 7 Law Rep., Ch. App. 686, S. C.; *Hunt v. Hewitt*, 7 Ex. R. 243, 244; *Forshaw v. Lewis*, 10 Ex. R. 712.

⁵ *Goodman v. Harvey*, 3 New R. 512, C. P.

action of detinue for a deed the defendant had pleaded a general lien for work done by him as solicitor for the plaintiff, the plaintiff, on an affidavit stating that he had never retained the defendant, and that the bill of costs was due not from himself, but from a third party whom he named, was permitted to inspect such entries in the solicitor's books as related to the costs in question.¹ So, where an action was brought by a Gas Light Company for the price of gas supplied under contract, and the defence was that the gas was deficient in quantity and defective in quality, the court, at the instance of the plaintiffs, ordered the inspection of certain papers in the possession of the defendants, which contained the results of experiments made by the defendants with the view of testing the illuminating power of the gas.² So, where, in an action by an architect to recover his commission for superintending the erection of certain buildings for defendant, the affidavit, in support of an application to inspect the plaintiff's day-book or journal, alleged that the work was never done; and that, if done, the charge was excessive; the court held that the defendant was entitled to an inspection to see if there were any entries relating to the work, and what price was therein charged.³ So, in an action against a railway company for injuries sustained on their railway, the plaintiff has been allowed to inspect a variety of reports, descriptive of the accident, made in the ordinary discharge of duty by different servants of the company to their general manager; but in the same case the court would not sanction the inspection of reports made to the defendants by scientific persons, whom they had consulted in confidence for the purpose of ascertaining how the accident had occurred.⁴

¹ *Scott v. Walker*, 2 E. & B. 555. See, also, *Rayner v. Allhusen*, 2 L. M. & P. 695, per Erle, J.; and *Galsworthy v. Norman*, 21 L. J., Q. B. 70, per id.

² *Lond. Gas Light Co. v. Chelsea Vestry*, 28 L. J., C. P. 275; 6 Com. B., N. S. 411, S. C.

³ *Hunt v. Hewitt*, 7 Ex. R. 236. See *Riccard v. Inclos. Commiss.*, 4 E. & B. 329.

⁴ *Woolley v. N. Lond. Ry. Co.*, 4 Law Rep., C. P. 602; 38 L. J., C. P. 317, S. C.; *Cossey v. Lond. Bright., &c., Ry. Co.*, 5 Law Rep., C. P. 146; 39 L. J., C. P. 174, S. C. See, also, *Mahoney v. Widows' Life Ass. Fund*, 6 Law Rep., C. P. 252; 40 L. J., C. P. 203, S. C.; *Richards v. Gellatly*, 7 Law Rep., C. P. 127; *Fenner v. Lond. & S.-East. Ry. Co.*, 41 L. J., Q. B. 313; 7 Law Rep., Q. B. 767, S. C.; *Malden v. Gt. North. Ry. Co.*, 9 Law Rep., Ex. 300; *Skinner v. Gt. North. Ry. Co.*, 43 L. J., Ex. 150; 9 Law Rep., Ex. 298, S. C.; and

The latter part of this last decision is all the more important, because it has furnished the rule by which the courts have somewhat reluctantly been guided since the new practice was introduced. Thus, in two recent cases, where railway companies were sued for injuries caused to passengers by an accident, reports by medical men, who had examined the complainants at the instance of the companies' solicitors, and for the purpose of advising them confidentially on the nature and extent of the injuries, have been protected from inspection as privileged communications.¹ In another case it was laid down broadly, first, by the Queen's Bench Division, and, next, by the Court of Appeal, that documents, which had been prepared by the agent of a party for the *purpose of being submitted to his solicitor* for advice in reference to an intended action, were privileged from inspection; and this too, though they had not, at the time when the inspection was sought, been actually submitted to the solicitor; and, moreover, though they had been drawn up, not at the solicitor's instance, but simply at the spontaneous suggestion of the client himself.² So, also, shorthand notes of evidence taken in a former trial have been protected from inspection.³ In an action, however, which was brought by a consignee of goods against a shipowner for damage caused by the ship's unseaworthiness, and in which no question arose respecting the solicitor's privilege, the court made an order for the plaintiff to inspect and copy certain surveys made on the ship in a foreign port, a general average statement, the shipwright's bill for repairs done to the ship, the captain's protest, and the log-book; for all these documents,—if not strictly evidence in themselves,—had an immediate tendency to advance the plaintiff's case, and were proximately connected with the issue to be tried.⁴

M'Corquodale v. Bell, 45 L. J., C. P. 329; L. R., 1 C. P. D. 471, S. C., and try to reconcile these irreconcilable decisions.

¹ Friend v. Lond. Chat. & Dov. Ry. Co., L. R., 2 Ex. 437, per Ct. of App.; 46 L. J., Ex. 696, S. C.; Pacey v. Lond. Tramways Co., id. 440, n., per Ct. of App.; 46 L. J., Ex. 698, S. C. See 31 & 32 V., c. 119, § 126.

² The Southwark Water Co. v. Quick, 47 L. J., Q. B. 258; L. R., 3 Q. B. D. 315, S. C.; The Theodor Korner, 47 L. J., Adm. 85; L. R., 3 P. D. 162, S. C.

³ Nordon v. Defries, L. R., 8 Q. B. D. 508; 51 L. J., Q. B. 415, S. C. See, also, The Palermo, L. R., 9 P. D. 6; 53 L. J., P. D. & A. 6, S. C.

⁴ Daniel v. Bond, 9 Com. B., N. S. 716. See Baker v. Lond. & S.-W. Ry.

§ 1796. In the case of *Doe v. Langford*¹ the facts were these:— § 1601
The defendant, being a freeholder of certain premises, was also assignee of a lease of other adjoining premises, the reversion of which was in the lessor of the plaintiff. A dispute arose respecting the boundary of the two properties, and ejectment was brought, at the expiration of the lease, to recover a plot of land which the lessor of the plaintiff alleged was parcel of the leasehold, but which the defendant claimed as his freehold. The lessor of the plaintiff thereupon applied to the court for leave to inspect the lease, as he had no counterpart of it, the assignment of the lease, and the conveyance of the freehold; but Mr. Justice Erle, while he granted so much of the application as related to the lease and assignment, refused to make any order with respect to the conveyance, as that deed could not in any way prove the title of the applicant to the land which he sought to recover. In the case of *Hill v. Philp*,² a question arose as to whether certain documents were privileged from inspection. There an action was brought against the keeper of a lunatic asylum for improper treatment of a lunatic, and the plaintiff sought to inspect the books kept by the defendant as required by the Act of 8 & 9 V., c. 100,—the defendant's licence,—the order and medical certificates under which the plaintiff was confined,—and all letters written either by the plaintiff's wife, or by the commissioners of lunacy, to the defendant relating to the plaintiff. The application was resisted on the fourfold ground, 1, that it was contrary to public policy to allow the inspection; 2, that the documents were strictly confidential; 3, that, if produced, they might subject the defendant to an indictment, and self-conviction could not be enforced; and, 4, that it did not appear in what way they could be material in support of the plaintiff's case. The court very properly overruled all these objections, and ordered the inspection as prayed.

§ 1797. The right to inspection is not limited to documents

Co., 37 L. J., Q. B. 53; 3 Law Rep., Q. B. 91; 8 B. & S. 645, S. C.; *Fraser v. Burrows*, 46 L. J., Ex. 501.

¹ 1 Bail Ct. Cas. 37, per Erle, J.; 21 L. J., Q. B. 217, S. C.

² 7 Ex. R. 232.

which may be *made evidence* in the action, but it extends to all which may throw light on the case. In *Hutchinson v. Glover*, where this doctrine was propounded by Mr. Justice Blackburn,¹ the plaintiff had shipped on board the defendant's vessel some goods which were afterwards damaged by a collision between that ship and another. Cross suits had been brought by the owners of the two vessels in respect of the collision, and had ended in a deed of compromise. The plaintiff sought to inspect this deed, and as it did not appear that the other shipowner objected, the court granted the application, holding that the document clearly related to the *matter in question*, as it *might* contain an admission of the defendant's liability. In *English v. Tottie*² the same point arose. There the defendant, having bought some timber abroad, resold it to the plaintiff, who afterwards, on its delivery, complained that it was not according to contract. Thereupon the defendant wrote to the sellers, and a long correspondence ensued, which resulted in a great abatement of price on the part of the original vendors. An inspection of this correspondence was sought by the plaintiff, and the court held that he was entitled to the information required.

§ 1798. It appears to have been held by Vice-Chancellor Bacon, that although the above rule expressly empowers the judge to order the production of documents "at any time during the pendency of an action," a plaintiff cannot obtain such an order until he has delivered a statement of claim.³ Too much reliance, however, should not be placed on this decision, for, first, it seems to rest on a very unsafe analogy between interrogatories and the discovery of documents,⁴ and next, it misapprehends and misapplies the old rule of Chancery on the subject. Under that rule, no doubt, a plaintiff could not enforce discovery until after he had filed his bill, but the filing of the bill was *then* the commencement of the suit, and consequently ought to be deemed equivalent to the issuing of

¹ 45 L. J., Q. B. 120, 121; L. R., 1 Q. B. D. 138, S. C.; *Bustros v. White*, L. R., 1 Ch. D. 425, per Jessel, M. R.

² 45 L. J., Q. B. 138; L. R., 1 Q. B. D. 141, S. C.

³ *Cashin v. Craddock*, L. R., 2 Ch. D. 140. But see *Rep. of Costa Rica v. Strousberg*, L. R., 11 Ch. D. 323, per Ct. of App.

⁴ See *Forshaw v. Lewis*, 10 Ex. R. 716, per Parke, B.

the writ under the present practice, and not,—as was held by the learned Vice-Chancellor,—to the delivery of the statement of claim,

§ 1799. When any cause or matter has been referred to an official or special referee under §§ 56 or 57 of the Judicature Act of 1873,¹ an order for the production of documents under Order XXXI., R. 14, may still be made by the judge who has directed the reference; and, subject to any such order, the referee himself may exercise a similar authority.² It seems, however, that when an action has by consent been referred with all matters in difference to an ordinary arbitrator, neither the judge nor the arbitrator has any power to order the inspection of documents,—the judge, because the suit, in such case, is no longer pending before the court,³ the arbitrator, because the order of reference, as given in the new Forms, gives him no such power.⁴

§ 1800. It will be seen that the ends sought to be attained by Rule 14 are twofold; the first object being to *discover* the *existence* and *description* of writings supposed to be in the possession of the opponent; the second, to acquire a *knowledge* of their contents, and to enforce, if necessary, their *production* at the trial. In many cases the applicant deems it necessary to gain both these ends, but in some he will be satisfied, at least in the first instance, by mere discovery. In this latter event Rule 12 affords a simple mode of proceeding, by enabling “any party, *without filing any affidavit*, to apply to the court or a judge for an order directing any other party⁵ to any cause or matter⁶ to make *discovery on oath* of the documents

¹ 36 & 37 V., c. 66.

² Ord. XXXVI., R. 50.

³ *Penrice v. Williams*, 52 L. J., Ch. 593, per Chitty, J. But see Form 26, Appendix K, which is an order for examination of witnesses and production of documents before arbitrator.

⁴ See Form 24, Appendix K.

⁵ It seems almost needless to add that this will include a foreigner, but a reasonable time will be given to such a party for the preparation of his affidavit. *The Emma*, 24 W. R. Adm. Div. 587; 34 L. T. 742, S. C. It will not include an official liquidator; *Re Mutual Society*, L. R., 22 Ch. D. 714, per Ct. of App.; 52 L. J., Ch. 621, S. C.; or a “next friend”; *Re Corsellis*, 52 L. J., Ch. 399. See ante, § 524c.

⁶ This term will include an action to recover land, *New Brit. Mutual Invest.*

which are, or have been, in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter,¹ or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion be thought fit." In order to avoid the obvious danger of this rule becoming in practice an engine of oppression by inflicting needless costs on suitors, the party applying for discovery must, by virtue of Rules 25 and 26 of the same Order, pay into court a sum of at least 5*l.*, so as to cover the costs incurred, in the event of the judge at the trial, or the court, or the taxing officer, being subsequently of opinion that the discovery asked for was unreasonable. The advantages derivable from this Rule have been much curtailed by what would seem to be an unwise decision,² that a judge ought not, except under special circumstances, to make an order for discovery at the instance of a plaintiff, until after a statement of defence has been delivered. The reasoning on which this ruling is founded appears to be, that the judge cannot know what matters are "in question in the action" before the defendant has specified the points on which he relies.³

§ 1800A. When an order under Rule 12 has been obtained, Rule 13 provides, that "the affidavit⁴ to be made by a party against

Co. v. Peed, L. R., 3 C. P. D. 196; and a petition of right, *Tomline v. The Queen*, 48 L. J., Ex. 453, per Ct. of App.; L. R., 4 Ex. D. 252, S. C.; but it will not include an action for penalties, *Hunnings v. Williamson*, L. R., 10 Q. B. D. 459; 52 L. J., Q. B. 400, S. C.

¹ See *Whyte v. Ahrens*, L. R. 26 Ch. D. 717, cited post, § 1807.

² *Hancock v. Guerin*, L. R., 4 Ex. D. 3. See *Union Bk. of Lond. v. Manby*, L. R., 13 Ch. D. 239, per Ct. of App.; 49 L. J., Ch. 106, S. C.; and *Davies v. Williams*, 49 L. J., Ch. 352.

³ *Hancock v. Guerin*, L. R., 4 Ex. D. 3.

⁴ Form 8, Appendix B., is as follows:—

188 [*Here put letter and number*].

"In the High Court of Justice.
Division.

Between A. B., plaintiff,
and
C. D., defendant.

Notice filed , 188

I, the above-named defendant C. D., make oath and say as follows:—
(4404)

whom such order has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce."

§ 1801. By referring to the form of affidavit as given in the note to the last section, it will be seen that the terms "possession and power," as used in Rules 12 and 14, apply not only to documents in the present custody of the declarant, but to such as have at any time been in his custody, as well as to all documents which are or have been in the possession, custody, or power, of his solicitors, or agents, or of any person on his behalf. It seems that any document will be treated as being in the power of a party, if it can be shown that he has some *legitimate control* over it,¹ as, for example, if it be held by the solicitor of a company of which the party is a

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.
2. I object to produce the said documents set forth in the second part of the said first schedule hereto.
3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].
4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.
5. The last-mentioned documents were last in my possession or power on [*state when*].
6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].
7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto."

¹ Wigr. Disc. § 294; Ex p. Shaw, Jacob, 272; Morrice v. Swaby, 2 Beav. 500; Rodick v. Gandell, 10 Beav. 270; Palmer v. Wright, id. 234; Vale v. Oppert, 44 L. J., Ch. 258; 10 Law Rep., Ch. App. 340, and 44 L. J., Ch. 579, S. C.; Monsel v. Lindsay, 13 Ir. Eq. R. 144. See Vivian v. Little, L. R., 11 Q. B. D. 370; 52 L. J., Q. B. 771, S. C.

director,¹ or the like. But, if documents be pledged by a litigant, they will no longer be regarded as "within his power."²

1802. When it appears by the defendant's affidavit that he has a *joint* possession of papers with some stranger who is not before the court,³ and who has an interest in them distinct from his own,⁴ the court will not order their production, provided that the stranger himself objects to that course being taken;⁵ nor indeed, in some cases, will it make such order when the only objecting party is the defendant himself.⁶ In any of these events, the plaintiff must either make the stranger a party to the action,⁷ or he may compel the defendant to furnish, in his answer to interrogatories, a full discovery of the contents of the documents.⁸ Should he adopt this latter course, and should the papers be in the custody of some one who holds them for the defendant and the stranger, the defendant must still answer the interrogatories respecting their contents; for every defendant is bound to inspect, and answer as to the contents of, all documents that are in his power; and all which he has a *right* to inspect, provided he can enforce that right, are in his *power*.⁹

§ 1803. It will be seen, on referring back to Rule 13,¹⁰ that in his affidavit of documents the party against whom the discovery is sought must specify which of those mentioned therein he objects to

¹ See *Steadman v. Arden*, 4 Dowl. & L. 16; 15 M. & W. 587, S. C.; *Ley v. Barlow*, 1 Ex. R. 800; *Shaw v. Holmes*, 3 Com. B. 952.

² *Liddell v. Norton*, 1 Kay, App. xi.

³ *Murray v. Walter*, Cr. & Ph. 114, 124, 125, per Ld. Cottenham; *Taylor v. Rundell*, id. 111; *Reid v. Langlois*, 1 M. & Gord. 627, 635—638, per id.; 2 Hall & T. 59, 69—72, S. C.; *Morrell v. Wootten*, 13 Beav. 105; *Edmonds v. Ld. Foley*, 31 L. J., Ch. 384, per Romilly, M. R.; 30 Beav. 282, S. C.; *Lopez v. Deacon*, 6 Beav. 254; *Hadley v. M'Dougal*, per Lds. Js., 7 Law Rep., Ch. App. 312; 41 L. J., Ch. 504, S. C.; *Penney v. Goode*, 1 Drew. 474; Wigr. Disc. § 294.

⁴ *Glyn v. Caulfield*, 3 M. & Gord. 463; *Few v. Guppy*, 11 Beav. 457.

⁵ See *Hutchinson v. Glover*, 45 L. J., Q. B. 120; L. R., 1 Q. B. D. 138, S. C.

⁶ *Kearsley v. Philips*, L. R., 10 Q. B. D. 36 and 565; 52 L. J., Q. B. 8 and 269, S. C.

⁷ *Lopez v. Deacon*, 6 Beav. 258, per Ld. Langdale; Wigr. Disc. §§ 294, 327.

⁸ *Lopez v. Deacon*, 6 Beav. 258; *Taylor v. Rundell*, 1 Phill. 222; *Plant v. Kendrick*, 10 Law Rep., C. P. 692.

⁹ *Taylor v. Rundell*, 1 Phill. 226, per Ld. Lyndhurst.

¹⁰ Ante, § 1800A.

produce; and in accordance with this provision it has been held by Vice-Chancellor Hall, that, even in a suit relating to land, where the defendant denies the plaintiff's title, and states fully his own, he cannot refer generally to "a bundle of documents relating exclusively to my own title," though he adds that they will not tend to help the plaintiff's case.¹ So, in a case where the representatives of the deceased partner had applied for the production and inspection of the partnership books, the surviving partner was not permitted to seal up certain entries in the books on a general affidavit that they were irrelevant to the matters in issue, but he was required to specify on oath the nature of the transactions which he sought to conceal, and to show that they did not in any way relate to the partnership business.² So, where a defendant, in his affidavit, objected to produce "certain documents and letters which have passed between my legal advisers and myself in relation to the matters in question, and with a view to this defence," and also "certain instructions to and opinions of counsel in relation to the same matters," this was held to be clearly insufficient for want of due identification.³ But where the defendant in the last case had filed a further affidavit, describing the documents as "numbered 50 to 76 inclusive, and tied up in a bundle marked A. and initialed by me," the Court of Appeal decided that quite sufficient had been done to identify the documents, as there could no longer be any difficulty in seeing that those referred to were produced, if it should become necessary to make such an order.⁴

§ 1804. When a party objects to produce documents on the ground of privilege, it is not sufficient for him to assert generally in his affidavit that "they are privileged"; but he must, in accordance with the prescribed form, state, and as far as possible verify, the facts on which the objection is founded.⁵

¹ *Fortescue v. Fortescue*, 24 W. R. 945; 34 L. T., 847, S. C.

² *Re Pickering*, L. R., 25 Ch. D. 247, per Ct. of App.; S. C. nom. *Pickering v. Pickering*, 53 L. J., Ch. 550.

³ *Taylor v. Batten*, L. R., 4 Q. B. D. 85, per Ct. of App.; 48 L. J., Q. B. 72, S. C.; *Bewicke v. Graham*, 50 L. J., Q. B. 396, per Ct. of App.; L. R., 7 Q. B. D. 400, S. C.; *Bristol, May. of, v. Cox*, L. R. 26 Ch. D. 681, 685, per Pearson, J.

⁴ *Id.*

⁵ *Gardner v. Irvin*, L. R., 4 Ex. D. 49, per Ct. of App.; 48 L. J., Ex. 223, S. C. nom. *Gardner v. Irwin*. See ante, p. 1532, n. 4.

§ 1805. The Rules are silent as to what course should be pursued, if the "party" required to produce documents be unable, from any cause, to make the affidavit referred to in Rule 13. The courts, however, have wisely determined to put a liberal interpretation on the language of the Rule, and have held that, in these cases, it will be sufficient if the affidavit be made by some competent person on behalf of the incompetent party. For instance, an infant may be ordered to make the affidavit by his next friend, or a lunatic by his committee.¹ So, if the party be a company or a foreign Government, the affidavit must be sworn, in the former case, by one or more of the company's members or officers,² and in the latter, by some minister or officer of the Foreign State resident abroad.³ In either of these last two cases the party seeking discovery has not, as it seems, an absolute right to select any particular officer he may choose to answer on an affidavit, but the court will take care that a fit person is chosen, and if the corporation or Foreign State be plaintiffs, it will stay the proceedings in the action, till they have named a proper officer to give discovery.⁴ In *Thomas v. The Queen*,⁵ where it was sought to apply the Rule respecting discovery to the procedure under a petition of right,⁶ the court, while rejecting the motion, gave as a reason for so doing that no officer had been specified by the Government to make the affidavit respecting documents on behalf of the Crown.

§ 1806. In all cases where the aid of the old Court of Chancery was invoked for the purpose of discovering the contents of papers, the applicant, whether plaintiff or defendant, had the burthen cast on him of proving his right thereto; and this proof could not be

¹ *Higginson v. Hall*, L. R., 10 Ch. D. 235, per Malins, V.-C.

² *Ranger v. Gt. West. Ry. Co.*, 4 De Gex & J. 74. It seems that the affidavit of the solicitor will not suffice. *Brown v. The Thames & Mersey Mar. Ins. Co.*, 43 L. J., C. P., 112. But see *Kingsford v. Gt. West. Ry. Co.* 16 Com. B., N. S. 761; 33 L. J., C. P. 307, S. C. See, also, Rule 5 of this Order, cited ante, § 524.

³ *Rep. of Liberia v. Imperial Bk.*, 16 Law Rep., Eq. 179; 42 L. J., Ch. 574, S. C.; L. R., 1 App. Cas. 139, nom. *Rep. of Liberia v. Royle*, S. C. in Dom. Proc.; 45 L. J., Ch. 297, S. C.

⁴ *Rep. of Costa Rica v. Erlanger*, L. R., 1 Ch. D. 171, per Ct. of App.

⁵ 10 Law Rep., Q. B. 44; 44 L. J., Q. B. 17, S. C. See *Tomline v. The Queen*, 48 L. J., Ex. 453, per Ct. of App. See *Tomline v. The Queen*, 48 L. J., Ex. 453, per Ct. of App.

⁶ 23 & 24 V., c. 34, § 7.

afforded by his own affidavit that the documents in question were in his opponent's possession, because, by virtue of an ancient rule in equity, the only evidence on which he could rely was the sworn admission of the opponent himself.¹ With a single exception (not here material), the court would not make an order for inspection of documents, unless the plaintiff could show from the *defendant's answer or affidavit*,² first, that the writings in question were in the *possession* or power of the defendant;³ and next, that they were *relevant* to the plaintiff's own case,⁴ or, in other words, that he had an *interest* in their production for the purpose of the trial, either as affording affirmative evidence of some right or title belonging to him,⁵ or as tending to disprove the title or case of his opponent, by showing some specific defect therein.⁶

§ 1806A. This was the practice of the old Court of Chancery, and this is the rule in the High Court now. Whenever, therefore, an affidavit of documents has been made in answer to an order for discovery, no contentious affidavit will be allowed in reply, for the battle must not be fought on affidavits;⁷ but if the judge be satisfied from the first mentioned affidavit itself, or from admissions in the pleadings of the party making it, or from documents mentioned therein, that it is not a sufficient compliance with the order, in that event, and in that event alone, a further order for a

¹ Wigr. Disc. § 293; Storey v. Ld. G. Lennox, 1 Myl. & Cr. 534; Lamb v. Orton, 22 L. J., Ch. 713.

² Wigr. Disc. §§ 293, 294; Llewellyn v. Badeley, 1 Hare, 527; Morrice v. Swaby, 2 Beav. 500; Gardner v. Dangerfield, 5 Beav. 389; Felkin v. Ld. Herbert, 30 L. J., Ch. 798.

³ Wigr. Disc. § 294. See Burbidge v. Robinson, 2 M. & Gord. 244; Reynell v. Spyre, 21 L. J., Ch. 13; 1 De Gex, M. & G. 656; S. C.

⁴ Wigr. Disc. §§ 299—301; Glover v. Hall, 2 Phill. 484; Peile v. Stoddart, 1 Hall & T. 207. See Adams v. Lloyd, 3 H. & N. 368; Manby v. Bewicke, 8 De Gex, M. & G. 476.

⁵ Wigr. Disc. § 295; Wright v. Vernon, 1 Drew. 344; Hambrook v. Smith, 17 Sim. 209.

⁶ Smith v. D. of Beaufort, 1 Phill. 209; 1 Hare, 507, S. C.; Stainton v. Chadwick, 3 M. & Gord. 575; 13 Beav. 320, S. C.; Glascott v. Copper Miners' Co., 11 Sim. 305; Combe v. Corp. of London, 1 Y. & C., Ch. 631; 15 L. J., Ch. 80, S. C.; Harris v. Harris, 4 Hare, 179; Att.-Gen. v. Emerson, 52 L. J., Q. B. 67; L. R., 10 Q. B. D. 191, S. C., per Ct. of App.

⁷ See Bewicke v. Graham, 50 L. J., Q. B. 396, per Ct. of App.; L. R., 7 Q. B. D. 400, S. C.

further affidavit may be made.¹ As this must now be regarded as a hard and fast rule, judges should be strict, and even severe, on parties who may in any degree be wanting in good faith in making affidavits of discovery.²

§ 1807. When the object is to obtain, not the discovery, but the *inspection* of documents, a less stringent doctrine is allowed to prevail; for Rule 18,—after enacting that when a party under notice³ omits to grant inspection, the judge may, on the application of the party desiring it, order inspection in such place and manner as he may think fit,—goes on to provide, that,—“except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents,—such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.” Rule 20 provides, that “if the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge *may*,—if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter,⁴ or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection,—order that such issue or question be determined first, and reserve the question as to the discovery or inspection.”⁵

¹ *Jones v. Monte Video Gas Co.*, 49 L. J., Q. B. 627, per Ct. of App.; L. R. 5 Q. B. D. 556, S. C.; *Compagnie Financière v. Peruvian Guano Co.*, 52 L. J., Q. B. 181; L. R., 11 Q. B. D. 55, per Ct. of App., S. C.

² *Jones v. Monte Video Gas Co.*, 49 L. J., Q. B. 630, per Thesiger, Ld. J.; L. R., 5 Q. B. D. 559, S. C.

³ The rule, by some blunder, is confined to notices for inspection, but probably the judges would feel justified in applying it to orders for inspection, when disobeyed.

⁴ See *Whyte v. Ahrens*, L. R. 26 Ch. D. 717, where the Ct. of App. was divided, as to whether merchants,—who had charged their agents with fraud in general terms, and been met by a defence denying the charges, and pleading a settled account,—were or were not bound to give particulars of fraud under Ord. XIX., R. 6, before obtaining an order for discovery of documents.

⁵ See *Wood v. The Anglo-Italian Bk.*, 34 L. T. 255, in C. P.; *Parker v. Wells*, L. R., 18 Ch. D. 477, per Ct. of App.; *In re Leigh's Estate*, *Rowcliffe v. Leigh*, L. R., 6 C. D. 256, per Ct. of App.

§ 1808. Rule 21, so far as it relates to discovery or inspection of documents, provides, that “if any party fails to comply with any order” for those purposes, he shall be liable not only to attachment, but, if a plaintiff, to have his action dismissed,¹ and if a defendant, to have his defence struck out.² Rule 22 provides, that “service of an order for interrogatories or discovery or inspection³ made against any party on his solicitor, shall be sufficient service to found an application for attachment for disobedience to the order. But the party against whom the application for an attachment is made may show, in answer to the application, that he has had no notice or knowledge of the order; or that the order is invalid, as not bearing the indorsement required by Ord. XLI., r. 5, warning him of the consequence of disobedience.”⁴ Although an order for attachment has been obtained, the party in default, on filing an affidavit of documents, may obtain ex parte an order of course discharging his contempt; but if, in such a case, the affidavit be insufficient, this order will be set aside on motion, and the original order for attachment will be revived.⁵ Rule 23 provides, that “a solicitor, upon whom an order against any party for interrogatories, or discovery, or inspection, is served under the last rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.”

§ 1809. Where documents are ordered to be produced for purposes of inspection, the order is generally confined to the applicant himself or his legal adviser. Still the law does not require such limitation to be strictly enforced in all cases; and the court will occasionally authorise an inspection by other persons, as, for instance, the plaintiff's land agent, even though he be himself a witness in the suit.⁶ So, if letters be written in a foreign language, the aid of an interpreter may be called in, and if the papers to be produced be engineering plans, a surveyor or other expert will be allowed to attend the inspection.⁷ So where documents are

¹ See *Rep. of Liberia v. Royce*, 45 L. J., Ch. 297; L. R., 1 App. Cas. 139, S. C.

² See ante, § 530, n. 3, where the Rule is set out verbatim.

³ *Joy v. Hadley*, 52 L. J., Ch; 471, per Fry, J.

⁴ *Hampden v. Wallis*, L. R., 26 Ch. D. 746, per Ct. of App.

⁵ *Price v. Price*, 48 L. J., Ch. 215, per Bacon, V.-C.

⁶ *Att.-Gen. v. Whitwood Local Board*, 40 L. J., Ch. 592.

⁷ *Swansea Vale Ry. Co. v. Budd*, 1 Law Rep., Eq. 274; 35 L. J., Ch. 631, S. C. (4411)

suspected to be forged, the court will sometimes, on an affidavit impeaching their genuineness,¹ order them to be submitted to experts, and such order may be made either before or after decree.²

§ 1810. Independent of the Rules under discussion,—which apply § 1610A to the Probate and Admiralty Divisions³ equally with the other Divisions of the High Court,—the Statutes passed in 1857 for amending the laws relating to probates, whether in England or in Ireland, respectively contain important provisions for the *special* purpose of enforcing the *production* of *testamentary instruments*. § 26 of the English Act,⁴ and § 31 of the Irish Act,⁵ severally enact, that the Probate Division may, on motion, or petition, or otherwise in a summary way, whether any suit or other proceeding shall or shall not be pending in the court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the court may direct such person to attend for the purpose of being examined in open court,⁶ or upon interrogatories, respecting the same, and such person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall

¹ *Boyd v. Petrie*, 3 Law Rep., Ch. App. 818; overruling S. C., per Ld. Romilly, M. R., 37 L. J., Ch. 344; and 5 Law Rep., Eq. 290.

² *Boyd v. Petrie*, 5 Law Rep., Eq. 290; 37 L. J., Ch. 344, S. C.

³ For the former law as to the Court of Probate, see 20 & 21 V., c. 77, § 36; c. 79, § 42, Ir.; *Hunt v. Anderson*, 1 Law Rep., P. & D. 476; and as to the Admiralty Court, see 24 & 25 V., c. 10, § 17, now repealed by 44 & 45 V., c. 59; *The Mary or Alexandra*, 38 L. J., Adm. 29; 2 Law Rep., Adm. & Ecc. 319, S. C.; *The Don Francisco*, Lush. Adm. R. 468; *The Macgregor Laird*, 36 L. J., Adm. 10. See, also, a similar clause in "The Ct. of Adm. Ireland Act, 1867," 30 & 31 V., c. 114, § 41, Ir.

⁴ 20 & 21 V., c. 77.

⁵ 20 & 21 V., c. 79, Ir.

⁶ In the goods of Laws, 41 L. J., Pr. & Mat. 41; 2 Law Rep., P. & D. 458, S. C. If the witness be unable through illness to attend the court, he may be ordered to attend before a commissioner, *Banfield v. Pickard*, L. R., 6 P. D. 33; 50 D. J., P. D. & A. 72, S. C.

be subject to the like process of contempt in case of default in not attending, or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the court and had made such default; and the costs of any such motion, petition, or other proceeding shall be in the discretion of the court."¹ Counsel will be allowed to attend on behalf of any persons who are subjected to examination under the above enactment;² but, in accordance with the Rules of the Supreme Court, 1883, Order XLIV., R. 2, the party proceeded against must receive notice of the application in the first instance.³

§ 1810A. Under Rule 64 of the Bankruptcy Rules, 1883, any party to any proceeding in any Bankruptcy Court "may, with the leave of the court, administer interrogatories to, or obtain discovery of documents from, any other party to such proceeding. Proceedings under this Rule shall be regulated as nearly as may be by the Rules of the Supreme Court, for the time being in force in relation to discovery and inspection."⁴ An application for leave under this rule may be made *ex parte*."

§ 1811. The law relating to the discovery, production, and inspection of documents in the County Courts is now regulated by Order XIII. of the County Court Rules, 1875. Rule 1 of that Order provides, that, "where in any action any party desires the *production* of any document relating to the matter in question in such action, he shall make an *affidavit*⁵ that he has reason to

¹ Application under the above enactment "may be made to the judge, by motion or by summons when a suit is pending, and by motion upon affidavit when no suit is pending." Reg. 73 of Rules of 1862 for Ct. of Prob. in contentious business, and Forms of subpoenas applicable to these cases which are there given, Nos. 21 & 22, and Forms of *Præcipe*, Nos. 23 & 24. See *Evans v. Jones*, 30 L. J., Pr. & Mat. 70.

² *In re Cope*, 36 L. J., Pr. & Mat. 83.

³ *Baigent v. Baigent*, L. R., 1 P. D. 421.

⁴ See Rules of 1883, Ord. XXXI., cited ante, p. 472.

⁵ "The affidavit for Discovery," as given in Form 54, is much more complex than would seem to be authorised by the Rule. It is as follows:—

"I, A. B., the above-named Plaintiff [or Defendant] make oath and say as follows:—[*Here set out in paragraphs the documents, and that the deponent is advised and believes that it is material and necessary for him, in order to sup-*

believe that such document or documents is or are in the possession or power of one of the parties, and the registrar shall, upon the delivery to him of the affidavit and a copy thereof, file the affidavit, and make an order¹ (annexing thereto the copy of the affidavit), that the party against whom such application is made shall *answer on affidavit*,² stating what documents he has in his possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he objects, and if so, on what grounds, to the production of such of the documents as are in his possession or power; and the time within which the opposite party shall return such affidavit to the Court shall be stated in the order, which order shall be served by the bailiff of the court, or a solicitor, or by post."

§ 1812. Rule 2 provides, that "the party against whom such order is made shall answer on affidavit³ according to the terms of

port his claim upon the trial, to have such documents produced to him, and that he will derive material advantage and support from their production, and that he is advised and believes that he is entitled to their production, and that he believes, that the said documents are in the possession or power of the defendant]."

¹ Form 55 is as follows:—

"Upon reading an affidavit by the Plaintiff [*or Defendant*], a copy of which is annexed marked A., I do order that the Plaintiff [*or Defendant*] do within days answer on affidavit, stating what documents he has in his possession or power relating to the matters in dispute in this cause, and what he knows as to the custody they or any or either of them are in, and whether he objects, and if so, on what grounds, to the production of such as are in his possession or power. And I further order that the costs of this application and of the discovery shall be costs in the cause."

² Form 56 is as follows:—

"I, _____, of _____, the above-named Plaintiff [*or Defendant*], make oath and says:—

1. That the documents hereinafter set forth are to the best of my knowledge and belief the only documents in my possession or power relating to the matters in dispute in this action, and the same are in my possession, viz.:—

A letter from _____ to _____ dated _____.

An agreement purporting to be between E. F. and G. H. dated _____.

2. I do not object to the production of the said documents, or any or either of them, [*or I object to the production of the said documents.*] [*or, if not to all but to some of them, state which*] on the following grounds, that is to say [*here state the grounds of objection*]."

³ See last preceding note.

the order, and send the affidavit and a copy thereof to the registrar, by post or otherwise, within the time stated in the order; and the registrar shall, immediately upon receiving such affidavit, file the same, and transmit by post or otherwise to the party making the application, the copy of the affidavit." Rule 3 provides, that "where, after such last-mentioned affidavit is filed, the party making the application requires a *further order* thereon, he shall apply to the registrar for such further order, and if there be no matter of fact or law in dispute between the parties, the registrar shall make an order in writing, in accordance with the facts; but if there shall be any matter of fact or law in dispute between the parties, the registrar shall transmit both affidavits to the judge, who shall direct the registrar to give notice,¹ by post or otherwise, to both parties, of a time and place when and where he will hear the application, and make such order thereon as shall be just."

§ 1813. Rule 4 provides, that "an order² for the production of

¹ "The notice of application for further order for production," as given in Form 287 of the Cy. Ct. Rules, 1876, is as follows:—

"Let all parties concerned attend at _____ on _____ the _____ day of _____, at _____ o'clock in the forenoon, on the hearing of an application on the part of _____ to consider the objection made by the affidavit of the _____, filed the _____ day of _____, pursuant to the order dated the _____ day of _____, to produce the documents set forth in the second part of the first schedule thereto [*or as may be*].

Dated this _____ day of _____

Registrar.

To the Plaintiff and Defendant."

² "The order for production of documents" under the Rule, as given in Form 286 of the Cy. Ct. Rules, 1876, is as follows:—

"Whereas _____ of _____ was duly summoned under a summons of this Court dated the _____ day of _____, to produce at the trial of this action upon this _____ day of _____ the following papers and documents.

[*Here set out documents contained in summons.*]

And whereas the said summons was duly served upon the said _____ upon the _____ day of _____ :

And whereas the said _____ has failed to produce the said documents above set out, or any or either of them [*or has failed to produce the following document, _____, being _____ of the documents above set out*]:

And whereas it has been proved to the satisfaction of this Court that the documents above set out [*or the following documents _____ being*

any deed or document shall state the time when and the person to whom the same shall be produced, and it may further order that the same may be deposited with the registrar to be produced at any trial or hearing, or that the registrar may make a copy thereof for any party." Rule 5 provides, that "where in any action any party is desirous of *inspecting* any written or printed document or instrument, which he is entitled to inspect, relating to the matter in question in such action, and which shall be in the possession or power or under the control of the other party, such first-mentioned party may, *five clear days* before the hearing, *give notice* to the other party by post or otherwise, that he or his solicitor desires to inspect any such document or instrument, describing the same, at any *place to be appointed by the other party*; and if such other party shall neglect or refuse to appoint such place, or to allow such plaintiff or defendant or his solicitor to inspect such document or instrument within *three clear days* after receiving such notice, the judge may, in his discretion, on the day of trial, *adjourn* the action, and make such order as to *costs* as he shall think fit."

§ 1814. Under the Friendly Societies Act, 1875, powers are conferred on the County Courts, and courts of summary jurisdiction, and also on the chief registrar and assistant registrars of Friendly Societies, to determine certain disputes, and all these functionaries have vested in them the authority of granting to either party such discovery as to documents, and otherwise, or such inspection of documents, as might be granted by any court of law or equity.¹

§ 1816. With respect to the *production* of documents at the trial § 1613 little need be said; for since parol evidence of the contents of

of the documents above set out] are in the possession, power, or control of the said , and that they relate to the matters in dispute in this action :

It is ordered that the said do, on or before the day of , produce and leave with the registrar of this Court, at his office situate at , the said following documents, namely, ."

The lawyer, who takes the trouble carefully to compare these several Rules and Forms, will perceive how disgracefully they have been drawn.

¹ 38 & 39 V., c. 60, § 22, subs. (e).

writings cannot be given as primary proof, the party who relies upon a document must either produce it, or give such satisfactory reason for its non-production as will justify him in having recourse to secondary evidence.¹ If, therefore, the paper be lost or destroyed, or if its production be physically impossible or highly inconvenient, the particular fact relied on must be proved;² if it be in the custody of a stranger, he must be served with a writ of subpœna duces tecum;³ and if it be in the hands or power of the adverse party, the practice in general is to give him or his solicitor a regular notice to produce it at the trial.⁴ Not that, on proof of such notice, the adversary is compellable to furnish evidence against himself; but the notice is given,—as has been before explained,⁵—to lay a foundation for the introduction of secondary evidence of the contents of the document, by showing that the party has done all in his power to insure its production.

§ 1817.⁶ Where notice has been given to the opponent to produce papers in his possession or power, the *regular time for calling for their production* is not until the party who requires them has entered upon his case; till which time the other party may, in strictness, refuse to produce them, and no cross-examination as to their contents is then allowable.⁷ Still, it is considered rigorous to insist upon this rule, and as a close adherence to it would be productive of inconvenience, the judges are very unwilling to enforce it.⁸ The production of papers upon notice does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence,⁹ at least if they be in any way material to the issue.¹⁰ The reason for this rule is, that

¹ Ante, § 428. As to the effect of producing a document to a witness under cross-examination, see ante, §§ 1413, 1446, 1452.

² Ante, §§ 428, 429, 438.

³ Ante, § 457.

⁴ Ante, § 440, et seq.

⁵ Ante, § 440.

⁶ Gr. Ev. § 563, in part.

⁷ *Graham v. Dyster*, 2 Stark. R. 23.

⁸ *Sideways v. Dyson*, 2 Stark. R. 49; *Calvert v. Flower*, 7 C. & P. 386, per *Ld. Denman*.

⁹ *Calvert v. Flower*, 7 C. & P. 386; *Wharam v. Routledge*, 5 Esp. 235, per *Ld. Ellenborough*.

¹⁰ *Wilson v. Bowie*, 1 C. & P. 10, per *Park, J.* See *Sayer v. Kitchen*, 1 Esp. 210.

it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties.

§ 1818. If a party, after notice, declines to produce a document, § 1615 when formally called upon to do so, he will not afterwards be allowed to change his mind; and therefore, if he once refuses, he cannot, when his opponent has proved a copy, and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness.¹ Neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination,² or to produce and prove it as part of his own case.³ The same rule prevails where a party determines upon keeping back a chattel, when called upon under notice to produce it.⁴

§ 1819.⁵ When the instrument, on its production, appears to § 1616 have been *altered*, it is a general rule that *the party offering it* in evidence *must explain* this appearance, *if he be called upon to do so by the same issue raised*,⁶ and *if the instrument be not admitted by his opponent under notice*; ⁷ because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion.⁸ If the alteration be noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted

¹ *Edmonds v. Challis*, 7 Com. B. 413, 439; 6 Dowl. & L. 581, 596, S. C.; *Jackson v. Allen*, 3 Stark. R. 74.

² *Doe v. Cockell*, 6 C. & P. 527, 528, per Alderson, B.

³ *Doe v. Hodgson*, 12 A. & E. 135; 2 M. & Rob. 283, S. C.; *Collins v. Gashon*, 2 Fost. & Fin. 47, per Byles, J.

⁴ *Lewis v. Hartley*, 7 C. & P. 405, per Ld. Abinger. There notice was given to produce a dog for the purpose of identification.

⁵ Gr. Ev. § 564, in part.

⁶ *Parry v. Nicholson*, 13 M. & W. 779, per Parke, B.

⁷ *Freeman v. Steggall*, 14 Q. B. 202; ante, § 724B.

⁸ *Henman v. Dickinson*, 5 Bing. 183; 2 M. & P. 289, S. C.; *Clifford v. Parker*, 2 M. & Gr. 910; *Lond. & Bright. Ry. Co. v. Fairclough*, id. 705, per Tindal, C. J.; *Ld. Falmouth v. Roberts*, 9 M. & W. 471.

for, and the credit of the instrument is restored.¹ It was formerly a presumption of law, that an interlineation, if nothing appeared to the contrary, had been made contemporaneously with the execution of the instrument;² and this presumption still prevails in the case of a deed, because a deed cannot be altered after its execution without fraud or wrong, and fraud or wrong is never assumed without some proof.³ Indeed, it may be laid down as a general rule, that wherever it is an offence to alter a document after it has been completed, the law presumes, *prima facie*, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence.⁴ With respect, however, to a bill of exchange, or a promissory note, the law presumes nothing,⁵ but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made; and then, on considering the extrinsic evidence offered, at what time, and under what circumstances, such alteration, if any, was made.⁶ These last questions cannot be solved by the jury on the mere inspection of

¹ With respect to some few instruments the Legislature has expressly declared that all alterations made therein shall be void, unless they be duly attested. Thus the Merchant Shipping Act of 1854, 17 & 18 V., c. 104, enacts in § 163, that "Every erasure, interlineation, or alteration in any such agreement with seamen as is required by the third part of this Act (except additions so made as hereinbefore directed for shipping substitutes or persons engaged subsequently to the first departure of the ship) shall be wholly inoperative, unless proved to have been made with the consent of all the persons interested in such erasure, interlineation, or alteration, by the written attestation (if made in her Majesty's dominions) of some shipping master, justice, officer of customs, or other public functionary, or (if made out of her Majesty's dominions) of a British consular officer, or where there is no such officer, of two respectable British merchants." This attestation is not required in the case of fishing boats, see 46 & 47 V., c. 41, § 22.

² *Trowel v. Castle*, 1 Keb. 22. As to alteration in wills, see *ante*, § 164.

³ *Doe v. Catmore*, 16 Q. B. 475; *Simmonds v. Rudall*, 1 Sim. N. S. 136, per *Ld. Cranworth*.

⁴ *R. v. Gordon*, *Pearce & D.* 586, 591. There an affidavit was produced with an interlineation on it.

⁵ *Johnson v. D. of Marlborough*, 2 Stark. R. 278, per *Abbott, J.*

⁶ *Bishop v. Chambre*, *M. & M.* 116; 3 C. & P. 55, S. C.; *Taylor v. Mosely*, 6 C. & P. 273; *Cariss v. Tattersall*, 2 M. & Gr. 890. All these questions are of course determined in the first instance by the court, when they are raised upon a preliminary objection to the admissibility of the instrument; but they are again open to the jury. *Ross v. Gould*, 5 Greenl. 204.

the writing, for juries must decide, not on conjecture, but on proof.¹

§ 1820. The rule of law applicable to this subject, is, that any *material alteration* in a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the privity of the party to be affected by it, and perhaps, also, with the additional proviso, that the alteration was made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it.² This rule,—which was originally propounded with respect to deeds,³ probably because in former days most written engagements were drawn in that form,⁴—has since been extended to negotiable securities,⁵ bought and sold notes,⁶ guarantees,⁷ and policies of assurance;⁸ and may now be said to apply equally to all written instruments, which constitute the evidence of contracts.⁹ § 1617

§ 1821.¹⁰ The grounds of this doctrine are twofold. The first is that of public policy, which dictates that no man should be permitted to take the chance of committing a fraud, without running any risk of losing by the event in case of detection.¹¹ The other is, to ensure the identity of the instrument, and prevent the substitution of another, without the privity of the party concerned.¹² Besides these grounds, which are common to all § 1618

¹ *Knight v. Clements*, 8 A. & E. 215; 3 N. & P. 375, S. C.; *Clifford v. Parker*, 2 M. & Gr. 909; *Byrom v. Thompson*, 11 A. & E. 33.

² *Davidson v. Cooper*, 11 M. & W. 778, 799, 802; 13 M. & W. 343, S. C. by Ex. Ch. See post, §§ 1827—1829.

³ *Pigot's case*, 11 Rep. 27.

⁴ *Master v. Miller*, 4 T. R. 330, per *Ld. Kenyon*.

⁵ *Id.*; 2 H. Bl. 141, S. C. in error.

⁶ *Powell v. Divett*, 15 East, 29; *Mollett v. Wackerbarth*, 5 Com. B. 181.

⁷ *Davidson v. Cooper*, 11 M. & W. 778.

⁸ *Forshaw v. Chabert*, 3 B. & B. 158; 6 Moore, 369, S. C.; *Fairlie v. Christie*, 7 Taunt. 416; 1 Moore, 114; *Holt*, N. P. R. 331, S. C.; *Campbell v. Christie*, 2 Stark. R. 64, per *Ld. Ellenborough*.

⁹ *Davidson v. Cooper*, 11 M. & W. 802.

¹⁰ Gr. Ev. § 565, as to first six lines.

¹¹ *Master v. Miller*, 4 T. R. 329, per *Ld. Kenyon*.

¹² *Sanderson v. Symonds*, 1 B. & B. 430, per *Dallas*, C. J.

altered written instruments, a third reason for the rule, chiefly as it applies to bills of exchange and promissory notes, may be found in the necessity which obtains for protecting the revenue arising from the stamp laws;¹ but with respect to these laws, it should be observed, that it is immaterial whether the alteration were made with or without the consent of the parties to the instrument.²

§ 1822. In saying that an instrument will be rendered void § 1619 by any *material* alteration, indefinite language is of necessity employed, but a short reference to some of the leading cases on this subject will serve, in a great measure, to explain what constitutes materiality. Thus, any alteration in negotiable securities, as to the date,³ amount, or time of payment;⁴ the addition of a claim for a specific rate of interest;⁵ the insertion of words to limit or vary the consideration as originally expressed;⁶ the introduction of a place for payment, though the acceptance still remains a general acceptance;⁷ the substitution of one place for another;⁸ the converting a joint, into a joint and several, responsibility;⁹ the affixing an additional maker's name to a joint and several note after it has issued;¹⁰ or, it seems, the cutting off the signa-

¹ *Mason v. Bradley*, 11 M. & W. 394, per Parke, B.; *Davidson v. Cooper*, id. 787, per id.

² *Bowman v. Nichol*, 5 T. R. 537.

³ *Outhwaite v. Luntley*, 4 Camp. 179, per Ld. Ellenborough; *Walton v. Hastings*, id. 223; 1 Stark. R. 215, S. C., per id.; *Cardwell v. Martin*, 9 East, 180; *Master v. Miller*, 4 T. R. 320; 2 H. Bl. 140, S. C.; *Vance v. Lowther*, 45 L. J., Ex. 200; L. R., 1 Ex. D. 176, S. C.

⁴ *Bowman v. Nichol*, 5 T. R. 537; *Alderson v. Langdale*, 3 B. & Ad. 660.

⁵ *Warrington v. Early*, 2 E. & B. 763.

⁶ *Knill v. Williams*, 10 East, 431.

⁷ *Macintosh v. Haydon*, Ry. & M. 362, per Abbott, C. J.; *Burchfield v. Moore*, 3 E. & B. 683; *Desbrowe v. Wetherby*, 1 M. & Rob. 438, per Tindal, C. J.; S. C. nom. *Desbrow v. Wetherley*, 6 C. & P. 758; *Taylor v. Moseley*, 1 M. & Rob. 439, n., per Ld. Lyndhurst, C. B.; 6 C. & P. 273, S. C.; *Crotty v. Hodges*, 4 M. & Gr. 561; 5 Scott, N. R. 221, S. C.; *Cowie v. Halsall*, 4 B. & A. 197; 3 Stark. R. 36, S. C. See 45 & 46 V., c. 61, § 19.

⁸ *Tidmarsh v. Grover*, 1 M. & Sel. 735; *R. v. Treble*, 2 Taunt. 329; *R. & R.* 164, S. C.

⁹ *Perring v. Hone*, 4 Bing. 28; 12 Moore, 135; 2 C. & P. 401, S. C.

¹⁰ *Gardner v. Walsh*, 5 E. & B. 83; overruling *Catton v. Simpson*, 8 A. & E. 136; 3 N. & P. 248, S. C. See *Gould v. Coomb*, 1 Com. B. 543; *Ex p. Yates*, In re Smith, 27 L. J., Bkptey. 9; 2 De Gex & J. 191, S. C.

ture of one of several co-promisers in a joint and several note;¹—will, at common law, as against any party *not consenting* thereto, invalidate the instrument, even in the hands of an innocent holder; and will for the most part prove equally fatal, by virtue of the stamp laws, though made by consent of all parties.² So, the alteration of a Bank of England note, by erasing the number upon it and substituting another, will avoid the instrument, and preclude even a *bonâ fide* holder for value from maintaining an action upon it.³ Where a sold note was altered, without the knowledge of the purchaser, by inserting an additional term into the contract,⁴—and where an agreement was apparently converted into a deed, by affixing seals to the signature of the parties,⁵—the respective instruments were held to be vitiated; and, in short, any alteration which causes an agreement or other writing to speak a language different, in legal effect, from what it originally spoke, is material.

§ 1823. On the other hand, the insertion of such words as the law would supply, or such as are altogether inoperative, or such as are necessary to correct an obvious error,⁶ will not constitute a material alteration, even though made without consent; neither will an instrument be avoided by virtue of the stamp laws, though it be altered after execution in a material particular, provided the parties agree to make such alteration, in order to correct a mistake, and in furtherance of their original intention. Thus, where, subsequent to the execution of a policy, the insured in-

¹ *Mason v. Bradley*, 11 M. & W. 590. See *Nicholson v. Revill*, 4 A. & E. 675; 6 N. & M. 192, S. C. The removing, however, of the seal of one of several obligors, does not, in the case of a *several* bond, render it void as to the others. *Collins v. Prosser*, 1 B. & C. 682; 3 D. & R. 112, S. C. See, also, *Caldwell v. Parker*, 1 R., 3 Eq. 519; though this case has been much doubted, if not overruled by *Suffell v. Bk. of Eng.*, 51 L. J., Q. B. 401, per Ct. of App.; L. R., 9 Q. B. D. 555, S. C.

² *Chit. on Bills*, 181—185; 1 *Smith*, L. C. 776, 811, et seq.

³ *Suffell v. Bk. of Eng.*, 51 L. J., Q. B. 401, per Ct. of App.; L. R., 9 Q. B. D. 555, S. C., overruling S. C., L. R., 7 Q. B. D. 270. See *Leeds & County Bk. v. Walker*, L. R., 11 Q. B. D. 84; 52 L. J., Q. B. 590, S. C.

⁴ *Powell v. Divett*, 15 East, 29; *Mollett v. Wackerbarth*, 5 Com. B. 181.

⁵ *Davidson v. Cooper*, 11 M. & W. 784; 13 M. & W. 353, S. C., in Ex. Ch.

⁶ See *Bluck v. Gompertz*, 7 Ex. R. 862.

serted some words which gave him no power to do any one thing which he could not have done under the policy as it originally stood, the court held that the instrument was not vacated;¹ and where the words "by demand" were added to a promissory note, which originally expressed no time for payment, this alteration, as it did not change the legal effect of the instrument, was held not to vitiate it, though the words were added by the payee without the assent of the maker.² Again, the insertion or alteration of a place for payment in a bill of exchange, though made after its acceptance, will not invalidate the instrument, at least as against the acceptor, provided the words be added or altered by the acceptor, or with his consent.³ So, filling in the date of a warrant of attorney after execution will not avoid the instrument, for the parties must clearly have intended that the date should be inserted.⁴ So, in a bond conditioned for the payment of 100*l.*, where the word "hundred" had been accidentally omitted in the second place in which the sum was mentioned, its insertion by a stranger was held to be immaterial;⁵ and where, in a note intended to be negotiable, the words "or order" had been left out by mistake, their insertion by the holder, with the consent of the maker, was held neither to vitiate the instrument nor to render a new stamp necessary.⁶

§ 1824. It is not, however, on every occasion of a party tender- § 1621
ing an instrument in evidence, that he is bound to explain any

¹ *Sanderson v. Symonds*, 1 B. & B. 426; 4 Moore, 42, S. C.; *Clapham v. Cologan*, 3 Camp. 382, per *Ld. Ellenborough*.

² *Aldous v. Cornwell*, 3 Law Rep., Q. B. 573; 37 L. J., Q. B. 201; and 9 B. & S. 607, S. C.

³ *Walter v. Cubley*, 2 C. & M. 151; *Stevens v. Lloyd*, M. & M. 292, per *Ld. Tenterden*; *Jacob v. Hart*, 6 M. & Sel. 142.

⁴ *Keane v. Smallbone*, 17 Com. B. 179.

⁵ *Waugh v. Bussell*, 5 Taunt. 707.

⁶ *Byrom v. Thompson*, 11 A. & E. 31; *Kershaw v. Cox*, 3 Esp. 246; *Hamelin v. Bruck*, 9 Q. B. 306; *Jacob v. Hart*, 6 M. & Sel. 142; *Brutt v. Picard*, Ry. & M. 37; *Robinson v. Touray*, 1 M. & Sel. 217; *Farquhar v. Southey*, M. & M. 14; *Eagleton v. Gutteridge*, 11 M. & W. 465. For American cases connected with this subject, see *Hunt v. Adams*, 6 Mass. 519, 522; *Smith v. Crooker*, 5 Mass. 538; *Hale v. Russ*, 1 Greenl. 335; *Knapp v. Maltby*, 13 Wend. 587; *Brown v. Pinkham*, 18 Pick. 172.

material alteration that appears upon its face; but only on those occasions, when he is *seeking to enforce it, or claiming an interest under it*.¹ The extent and meaning of this rule may be well illustrated by the following cases. A party became tenant of a farm from year to year, and subsequently signed an agreement respecting the mode of tillage. His landlord brought an action for not cultivating the land according to the terms of the agreement, and the instrument, when produced, contained an erasure in the habendum, the term of years being altered from seven to fourteen. The court decided that the landlord was not bound to explain this alteration, because the tenant held the farm under a parol agreement, which incorporated only so much of the written instrument as was applicable to a yearly holding, and consequently it was quite immaterial whether seven or fourteen years were mentioned in that instrument. The simple contract which the parties had entered into was, that the tenant should farm the land according to certain written stipulations. "The rule of law," said Mr. Baron Parke, "applies where the obligation is by reason of the instrument; here the obligation is by reason of the parol contract of the parties, quite independent of the subscription of that paper, and arising from the occupation of the land upon all the terms of that instrument which are applicable to a tenancy from year to year, as to which an alteration in the term of years is wholly immaterial."²

§ 1825. So, in the case of *Hutchins v. Scott*,³ which was an action for an excessive distress, the plaintiff, in order to prove the amount of rent really due, put in the agreement for the lease

¹ *Harris v. Tenpany*, 1 Cab. & El. 65, seems to be an utter misapprehension of the law. That was an interpleader, in which the plaintiff claimed certain furniture which had been seized by an execution creditor. He relied on an agreement of hiring by which he had let to the execution debtor "several articles mentioned in the schedule hereto." At the time of executing this contract, no schedule was attached to it, but one was afterwards added by the plaintiff. On these facts Mr. Justice Lopes is reported to have actually held, that the agreement was not vitiated by the alteration, but that the goods seized might be identified with those named in the schedule. Sed qu.

² *Ld. Falmouth v. Roberts*, 9 M. & W. 471. See, also, *Pattinson v. Luckley*, 10 Law Rep., Ex. 330.

³ 2 M. & W. 809.

of a house, No. 35, which was in fact the house occupied by him. The number originally inserted in the instrument was 38, and the jury found that this had been altered to 35 after the execution of the agreement, and without the defendant's knowledge. The court held that, as the demise was admitted on record, the altered agreement might be given in evidence to show the terms of the holding. "I do not think," said Lord Abinger, "when the case is rightly understood, that the question arises, whether an alteration even by the plaintiff ought to avoid the agreement. If it does, the only consequence would be, that it would be impossible for him to maintain an action upon it as on a demise; but is quite a different question, whether it be given in evidence. *It may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact.*¹ * * * No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws. * * * Here, however, it is sufficient to decide, that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house No. 35."²

§ 1826. So, also, a deed is not rendered inadmissible by alteration, if it be produced, "merely as proof of some right or title created by, or resulting from, its *having been executed*;"³ as in the case of an ejectment to recover lands which have been conveyed by lease and release. There, what the plaintiff is seeking to enforce is not, in strictness, a right under the lease and release, but a right to the possession of the land, resulting from the fact of the lease and release having been executed. The moment after their execution the deeds become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deed was to create a title to the land in question, that title cannot be effected by the subsequent alteration of the deeds. But if the party is not pro-

¹ See, also, *Agricult. Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432.

² 2 M. & W. 815—817.

³ See *Agricult. Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432; *Ld. Ward. v. Lumley*, 29 L. J., Ex. 322; 5 H. & N. 87, S. C.

ceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, then the alteration of the deed in any material point after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover.”¹ In like manner, if the estate lies *in grant*, as a watercourse, and cannot exist without deed, it is said that any alteration by the party claiming the estate will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone.²

§ 1827. In the case of *Davidson v. Cooper* above cited,³ the § 1624 old doctrine, that every material alteration of an instrument, *even by a stranger*, and *without the privity of either party*, avoids that instrument, has been recognised and adopted by the Court of Exchequer, and has been held to apply in all cases, *where the altered instrument is relied on as the foundation of a right sought to be enforced*.⁴ The supporters of this doctrine contend that it creates no real hardship, since the party whose right of action is defeated by the alteration has his remedy by an action against the spoliator;⁵ but this argument is entitled to little weight, since the spoliator may either be a child, or other irresponsible agent, or be utterly incompetent to pay any damages; and if it be further urged, as was done by the judges of the Exchequer Chamber in the same case,⁶ that the party who has

¹ *Davidson v. Cooper*, 11 M. & W. 800, per Ld. Abinger. See, also, *Dr. Leyfield's case*, 10 Rep. 88; *Bolton v. Bp. of Carlisle*, 2 H. Bl. 259; *Doe v. Hirst*, 3 Stark. R. 60.

² *More v. Salter*, 3 Bulst. 79, per Coke, C. J.; *Roll. R.* 188; *Lewis v. Payn*, 8 Cowen, 71.

³ Ante, § 1820.

⁴ *Davidson v. Cooper*, 11 M. & W. 779, 800; *Crookewit v. Fletcher*. 26 L. J., Ex. 153; *Bk. of Hindos., China, & Japan v. Smith*, 36 L. J., C. P. 241.

⁵ *Markham v. Gonaston*, Cro. El. 626; 11 M. & W. 791.

⁶ “After much doubt, we think the judgment (of the Ct. of Ex.) right. The strictness of the rule on this subject, as laid down in *Pigot's case*, can only be explained on the principle, that a party, *who has the custody of an instrument made for his benefit, is bound to preserve it in its original state*. It is highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer

the instrument in his possession is bound to take proper care of it, this at least assumes that the alteration is made while the instrument is in his custody, and consequently cannot support the broad proposition stated above. Indeed, it may perhaps be still questioned, whether the sound rule of law can be carried further than this, that any party, seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made, either before its execution, or at a time when the instrument was not in his possession, or under his control; and that, unless he can establish one or other of these facts, the instrument will be vitiated.

§ 1828. However, since the case of *Davidson v. Cooper*,¹ it appears to be clearly established in England, that no party can rely on a document which has been *altered while in his custody*, though he be in a position to prove most positively, that the alteration was the effect of pure accident or mistake, or was made without his privity or consent by some person, over whom he could exercise no control. Yet this doctrine surely accords but little with common notions of justice and equity;² and is, moreover, inconsistent, not only with several old cases, decided in conformity with the custom of merchants, in which it has been held, that the cancellation by mistake of a cheque or bill does not invalidate the instrument;³ but also with the express provisions of

§ 1625

has no right to complain, since there cannot be any alteration except through fraud or laches on his part." Per *Ld. Denman*, in pronouncing the judgment of the *Ex. Ch.*, 13 *M. & W.* 352.

¹ 11 *M. & W.* 778; 13 *id.* 343, *S. C.*

² It deserves notice that in New York the above doctrine is rejected, the law being as follows:—"The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made *by another without his concurrence*, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise." *Code Civ.* § 1794.

³ *Raper v. Birkbeck*, 15 *East*, 17; *Fernandey v. Glynn*, 1 *Camp.* 426; *Wilkinson v. Johnson*, 3 *B. & C.* 428; 5 *D. & R.* 403, *S. C.*; *Novelli v. Rossi*, 2 *B. & Ad.* 757; *Warwick v. Rogers*, 5 *M. & Gr.* 340.

the Bills of Exchange Act, 1882.¹ The doctrine is also opposed to the case of *Lady Argoll v. Cheney*,² where a deed to lead the uses of a recovery was held good, though the seals had been torn off by a little boy; and to the case of *Henfrey v. Bromley*,³ where an award was sustained, though the umpire, after it had been made, altered the amount, leaving the original sum awarded still legible. It must, however, be conceded, that these last two decisions are of less authority on this particular point, as they possibly turned on the distinction mentioned above, between an instrument constituting the foundation of a right, and that which simply furnishes evidence of some right, resulting from its execution.⁴

§ 1829. Be this as it may, it certainly deserves notice, that, according to a decision in the Irish Court of Exchequer, an instrument is not rendered void in Ireland by any alteration in it, which an unauthorised stranger may make;⁵ neither, in America, is the doctrine recognised to the extent now established in England;⁶ but, unless some fraudulent intent be brought home to the party claiming under the instrument, the unwarranted alteration of a writing by a stranger is treated as a merely accidental spoliation, which in that country does not vitiate the instrument.⁷ In the case of the *United States v. Spalding*,⁸ Mr. Justice Story strongly condemns the English doctrine, as repugnant to common sense and justice,—as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful act of third persons, or

¹ 45 & 46 V., c. 61, § 63, subs. 3.

² Palm. 402. "So in any case where the seal is torn off by accident after plea pleaded (see 1 Roll. R. 40, also cited in Pigot's case, 11 Rep. 27, and *Michael v. Scockwith*, Cro. El. 120, in both which cases the court on this ground held that the mutilated instrument was the deed of the party on non est factum); and in these days I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt on that point by stating the truth of the case:" per Buller, J., in *Master v. Miller*, 4 T. R. 339.

⁴ See ante, § 1826.

⁵ *Swiney v. Barry, Jones*, 109.

⁶ Gr. Ev. § 566 & n. 1, in part, as to next twelve lines.

⁷ *Cutts v. U. S.*, 1 Gall. 69; *U. S. v. Spalding*, 2 Mason, 478; *Rees v. Overbaugh*, 6 Cowen, 746; *Lewis v. Payn*, 8 Cowen, 71; *Jackson v. Malin*, 15 Johns. 297, per Platt, J.; *Nicholls v. Johnson*, 10 Conn. 192; *Marshall v. Gouglar*, 10 Serg. & R. 164.

⁸ 2 Mason, 482.

by the providence of Heaven,—and as a rule, which ought to have the support of unbroken authority, before a court of law should feel bound to surrender its judgment to what deserves no better name than a technical quibble. In these observations the American judge has been supported by Mr. Baron Alderson, who, in *Hutchins v. Scott*,¹ remarked, “It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, or what the parties meant.”

§ 1830.² It seems now to be tolerably clear that a mere *im-* § 1627
material alteration, though made by the *obligee himself*, will not avoid an instrument, provided it be done innocently, and to no injurious purpose.³ But if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important, whether it be in a material or an immaterial part; for, in either case, he has brought himself under the operation of the rule, established for the prevention of mal-practices; and having fraudulently destroyed the identity of the instrument, he must incur the peril of all the consequences.⁴

§ 1831. It has been seen that, in order to render the alteration § 1628
fatal, it must be made *after the execution or other completion of the instrument*. These words are, in general, sufficiently explicit; but in two classes of cases embarrassing questions respecting their

¹ 2 M. & W. 814.

² Gr. Ev. § 563, in part.

³ *Aldous v. Cornwell*, 37 L. J., Q. B. 201; 3 Law Rep., Q. B. 573; and 9 B. & S. 607, S. C.; *Sanderson v. Symonds*, 1 B. & B. 426; *Hatch v. Hatch*, 9 Mass. 311, per Sewell, J.; *Smith v. Dunbar*, 8 Pick. 246. In *Farquhar v. Southey*, M. & M. 14, the acceptance of a bill was signed “Southey & Crowder;” the bill was originally addressed to “Messrs. Southey, Crowder, & Co.,” but the address was altered to correspond with the acceptance. Held, that this was an immaterial alteration, and that the acceptors were not discharged, per Littledale, J.

⁴ *Pigot's case*, 11 Rep. 27; cited arguendo, in 4 T. R. 322, and 11 M. & W. 789; *Shep. Touch.* 68; *Sanderson v. Symonds*, 1 B. & B. 430, per Dallas, C. J. If an obligee procure a person, who was not present at the execution of the bond, to sign his name as an attesting witness, this is *prima facie* evidence of fraud, and avoids the bond. *Adams v. Frye*, 3 Mete. 103.

interpretation have arisen. The first class comprehends *policies of assurance, composition deeds, and other settlement deeds*, in which several parties with independent interests, joining to effect some general purpose, execute one common deed at different times. By considering such deeds as instruments of a peculiar nature, embracing separate contracts with different individuals, the strict rule of law has been, to a certain degree, eluded; and it has been held that any alterations made during the progress of such transactions still leave the deeds valid as to the parties previously executing them, provided such alterations have not affected the situation in which these parties stood.²

§ 1832. *Negotiable securities* constitute the second class, respecting which little difficulty arises in regard to the time when an alteration will be deemed fatal, if made without consent; because that time is calculated from the date of the making, accepting, drawing, or indorsing of the instrument by the party against whom it is produced; but the question is at what precise period will a bill or note be considered complete, so that any subsequent alteration, whether made with or without consent of the parties, will invalidate the instrument by reason of the *stamp laws*? In answer to this question, it may be broadly stated, that a negotiable security is complete, as soon as, but not until, it becomes an *available* instrument, or, in other words, when it is in the hands of a party who can make a valid claim upon it. Thus, on the one hand, an accommodation bill may be altered after it has been drawn, accepted, and indorsed, provided it has not been passed to a *bonâ fide* holder for value;³ and a bill for value, if unindorsed, is not deemed complete till its acceptance;⁴ nor, it seems, even then, unless it be absolutely returned to the payee.⁵ On the other hand, every material

¹ Davidson v. Cooper, 11 M. & W. 802, per Ld. Abinger. See West v. Steward, 14 M. & W. 47, cited post, § 1835.

² Doe v. Bingham, 4 B. & A. 675, per Bayley, J., recognised in Hibblewhite v. M'Morine, 6 M. & W. 215.

³ Downes v. Richardson, 5 B. & A. 674; 1 D. & R. 332, S. C.; Tarleton v. Shingler, 7 Com. B. 812. See Cardwell v. Martin, 9 East, 190.

⁴ Kennerly v. Nash, 1 Stark. Q. 452, per Ld. Ellenborough.

⁵ Sherrington v. Jermyn, 3 C. & P. 374, per Ld. Tenterden.

alteration, whether made before or after acceptance, or with or without consent, will invalidate a bill, whether it be drawn for accommodation or for value, if it be once issued to a person, who, as holder for valuable consideration, is entitled to sue any prior party thereon.¹

§ 1833. The principles above stated with respect to negotiable § 1630 securities, apply equally to other instruments; and therefore where a bond, after execution, but before it had passed to the obligee, was altered, by inserting, with the consent of the parties, the name of an additional obligor, the court held that it was not vacated, and that no new stamp was required.² The same point was ruled in *Jones v. Jones*,³ where a marriage settlement had been executed by the conveying party, but, before it was executed by the other parties, or had passed into the hands of the persons who were to take under it, a clause was objected to and struck out, after which the deed was re-executed. The question in these cases is, whether, taking into consideration all the circumstances, the matter was or was not in fieri; and that, to use Mr. Preston's language, "depends on the inquiry, whether the intended grantor has given sanction to the instrument, so as to make it conclusively his deed."⁴

§ 1834. Perhaps it may be stated, as a general rule, that the § 1631 transaction will be deemed incomplete, and, consequently, that an alteration may be effected, if the deed remain in the grantor's possession, or be placed in the hands of a third party as an agent for him, provided there be nothing to show that it was intended to operate immediately, or that it was accepted as an effectual deed by the party in whose favour it was made.⁵ So, if the instrument be delivered as an *escrow*, which is not to take effect as a deed until

¹ *Outhwaite v. Luntley*, 4 Camp. 179; *Walton v. Hastings*, id. 223; 1 Stark. R. 215, S. C. See further on this subject, *Chit. Bills*, 186—189.

² *Matson v. Booth*, 5 M. & Sel. 223; see *Zouch v. Clay*, 1 Ventr. 185; 2 Keb. 872, 881; 2 Lev. 35, S. C.

³ 1 C. & M. 721; 3 Tyr. 890, S. C. See, also, *Spicer v. Burgess*, 1 C. M. & R. 129; 4 Tyr. 598, S. C.; *Murray v. Ld. Stair*, 2 B. & C. 82; 3 D. & R. 278, S. C.; *Johnson v. Baker*, 4 B. & A. 440.

⁴ 3 Prest. on Abstr. 64.

⁵ See cases cited in last note but one.

a certain event has happened, it may be altered with impunity.¹ If, however, the *grantor has once parted with all control over the deed*, it can no longer be altered, though it has not been actually delivered to the grantee.² Thus, where A. executed a deed transferring certain railway shares to B., and, having received the purchase-money from B.'s brokers, delivered to them the instrument, the transaction was held to be perfected at common law, though B. had not executed the deed, and though the Railway Act directed that, on every sale of shares, the deed should be executed by both parties; and, therefore, the name of C. being afterwards substituted for B., and the deed re-executed by the seller, the court held that it could not operate as a conveyance to C. without a fresh stamp.³

§ 1835. Questions of nicety have sometimes arisen respecting the validity of instruments, which have been *executed in blank*, and subsequently filled up; and distinctions have been recognised, first, between deeds and other instruments; and secondly, as to deeds, between the insertion of matter essential to their operation, and that which is not so essential. Thus, writs and subpœnas may, it seems, be sealed in blank, and then filled up;⁴ and an acceptance written on a blank piece of stamped paper, may be afterwards converted into a bill of exchange, to the extent of such sum as the

¹ *Hudson v. Revett*, 5 Bing. 269; 2 M. & P. 663, S. C.; explained by Alderson, B., in *West v. Steward*, 14 M. & W. 49. See, also, cases cited ante, p. 1559, n. 3. The question whether a deed was executed as an escrow,—unless the point depends on documentary evidence alone,—is one for the jury, who should look to all the facts attending the execution, and who are not now bound, as formerly, to find in the negative, if no express words have been used declaratory of such an intention. *Bowker v. Burdekin*, 11 M. & W. 128, 147; *Furness v. Meek*, 27 L. J., Ex. 34; *Kidner v. Keith*, 15 Com. B., N. S. 35. See, also, *Gudgen v. Besset*, 26 L. J., Q. B. 36; 6 E. & B. 986, S. C.; *Watkins v. Nash*, 20 Law Rep., Eq. 262; 44 L. J. Ch. 505, S. C.; and ante, §§ 41, 43, & 1135.

² *Doe v. Knight*, 5 B. & C. 671; 8 D. & R. 348, S. C. See *Richards v. Lewis*, 11 Com. B. 1046; and *Xenos v. Wickham*, 2 Law Rep., H. L. 296; and 36 L. J., C. P. 313, S. C. in Dom. Proc., reversing judg. in Ex. Ch., 33 L. J., C. P. 13; 13 Com. B., N. S. 435, S. C.

³ *Lond. & Bright. Ry. Co. v. Fairclough*, 2 M. & Gr. 674, 705. Perhaps, if the Rail. Co., who produced and relied upon the altered deed, had shown that B.'s name had originally been inserted by *mistake*, no new stamp would have been requisite. See ante, § 1823.

⁴ See 6 M. & W. 207, *arguendo*.

stamp will cover.¹ As between the drawer and the acceptor, a blank acceptance must, indeed, be filled up within a reasonable time;² but this doctrine does not apply to a *bonâ fide* indorsee for value without notice, for the law presumes, with reference to him, that the drawer was invested with general authority from the acceptor to fill up the bill at any time.³ Again, it appears that blanks may be filled up in a deed after its execution, if the omission did not render it a nullity, and the matter inserted carries out the original intention of the grantor, or is introduced with his consent.⁴ Thus, where a party, being abroad, executed a power of attorney, whereby he appointed “— Ree of Ware” his attorney, and Mr. Ree, to whom the power was delivered, and who, according to the evidence, was the party intended to be authorised by it, inserted his Christian name in the blank space, it was held that the instrument was not invalidated, though possibly some objection might have been taken with respect to the stamp laws.⁵ So, where a debtor had assigned his property by deed to trustees for the benefit of his creditors, “whose names and the amount of whose debts were set out in a schedule thereunto annexed,” the court held that the deed was valid, though at the time of its execution by the debtor, no schedule was annexed, but when the deed was produced in evidence one was appended, containing the signatures of the creditors, some of which had been erased, and others had no sums set against them.⁶

§ 1836. But if an instrument, at the time of its execution, was, § 1633
by reason of some material deficiency, incapable of operating as a

¹ 45 & 46 V., c. 61, § 20, subs. 1; *Garrard v. Lewis*, L. R., 10 Q. B. D. 30; *Schultz v. Astley*, 2 Bing. N. C. 552, per Tindal, C. J.; *Collis v. Emmet*, 1 H. Bl. 313; *Russell v. Langstaffe*, 2 Doug. 514. See *Hatch v. Searles*, 2 Sm. & Gif. 147; *Hogarth v. Latham*, L. R., 3 Q. B. D. 643, per Ct. of App.; & *Lond. & S. West. Bk. v. Wentworth*, L. R., 5 Ex. D. 96; 49 L. J. Ex. 657, S. C.

² 45 & 46 V., c. 61, § 20, subs. 2; *Temple v. Pullen*, 8 Ex. R. 389. See *Carter v. White*, L. R., 20 Ch. D. 225; 51 L. J., Ch. 465, S. C.; *Riley v. Gerish*, 9 Cush. 104.

³ 45 & 46 V., c. 61, § 20, subs. 3. *Montague v. Perkins*, 22 L. J., C. P. 187. See *Hatch v. Searles*, 2 Sm. & Gif. 147.

⁴ *Markham v. Gonaston*, Cro. El. 626; M. 547, S. C.; *Zouch v. Clay*, 1 Vent. 185; 2 Keb. 872, 881; 2 Lev. 35, S. C.

⁵ *Eagleton v. Gutteridge*, 11 M. & W. 465.

⁶ *West v. Steward*, 14 M. & W. 47.

deed, it cannot afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, unless such stranger be authorised by instrument under seal; for, if this were permitted, the principle would be violated which requires that an attorney to execute and deliver a deed for another must himself be appointed by deed.¹ Thus, where a proprietor of railway shares executed a conveyance of three shares with the name of the purchaser in blank, it was held that nothing passed by this deed, and that an agent appointed by parol could not afterwards, in the absence of his principal, introduce the name of the vendee;² and where a deed contained a covenant to deliver to the covenantee certain articles "as per schedule annexed," and the schedule was not annexed at the time of execution, the court decided that its subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed, and, consequently, that the instrument was insensible and void.³

§ 1837. It should be observed that these last two cases turned § 1634 partly on the fact that the deficiency was supplied in the absence of the granting and contracting party; and indeed, had not this been the case, the decisions would possibly have been different; for, on the principle adopted in *Hudson v. Revett*,⁴ if a blank in a material part of a deed be filled up after execution, and the party be present at the time and ratify the act, this will amount to evidence of re-delivery, and the deed will be held valid. In that case the defendant executed and delivered a deed, conveying his property to trustees for the benefit of his creditors, the particulars of whose demands were stated therein; but a blank was left for one of the principal debts,

¹ *Hibblewhite v. M'Morine*, 6 M. & W. 214, 216, per Parke, B. See ante, § 985.

² *Hibblewhite v. M'Morine*, 6 M. & W. 200, overruling *Texira v. Evans*, cited 1 Anstr. 228. See *Swan v. N. Brit. Austral. Co.*, 7 H. & N. 603; S. C. in Ex. Ch., 32 L. J., Ex. 273; and 2 H. & C. 175; *Taylor v. Gt. Ind. Pen. Ry. Co.*, 4 De Gex & J. 559; S. C. in error, 28 L. J., Ch. 714, 715.

³ *Weeks v. Maillardet*, 14 East, 568, noticed by Parke, B., in 6 M. & W. 215; and in *West v. Steward*, 14 M. & W. 48. See *Dyer v. Green*, 1 Ex. R. 71; and *Daines v. Heath*, 3 Com. B. 938.

⁴ 5 Bing. 269; 2 M. & P. 663, S. C.; explained by Alderson, B., in *West v. Steward*, 14 M. & W. 49. See, also, *Tupper v. Foulkes*, 30 L. J., C. P. 214; 9 Com. B., N. S. 797, S. C.

the exact amount of which was subsequently ascertained and inserted in the deed, in the grantor's presence and with his assent, by the attorney who had prepared the deed and had it in his possession, he being one of the trustees. The defendant having afterwards recognised this instrument as valid in various transactions, the court, considering that it was originally executed as an escrow, and was not intended to be a perfect deed till all the blanks were filled up, held that the act of the grantor, in assenting to the filling up of the blank, amounted to a re-delivery of the deed thus completed.¹

§ 1838. Notwithstanding the rule of law which requires the party, tendering in evidence an altered instrument, to explain its appearance, it is now decided, at least with respect to letters and ancient documents coming from the right custody, that the mere fact of their being in a *mutilated or imperfect state*, will not throw upon the party producing them the burthen of proving when, by whom, or for what purpose, they were mutilated; but such documents will be received, though the mutilation be evidently not accidental, provided that a sufficient portion of the instrument remains to explain its general nature and effect, and it can be shown that it is produced in the same state in which it was actually found. The weight due to such a document may be a just matter of comment, and in many cases the jury would regard it as utterly valueless; still, no legal objection can be taken to its being presented to their notice, such as it is; and the right enjoyed by the opponent, of insisting that the whole instrument shall be read, is not infringed

¹ The same effect was given to clear and unequivocal acts of assent in pais by a feme mortgagor, after the death of her husband, as amounting to a re-delivery of a deed of mortgage, executed by her while a feme covert. *Goodright v. Straphan*, 1 Cowp. 201, 204; *Shep. Touch.* 58. "The general rule," said Johnson, J., in delivering the judgment of the court in *Duncan v. Hodges*, 4 M'C. 239, "is, that if a blank be signed, sealed, and delivered, and afterwards written, it is no deed; and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order in the manner of execution, but in the end makes it perfect before the delivery, it is a good deed." See ante, § 149.

by its admission, since that rule merely provides that no part of the deed, in the state in which it actually is, shall be withheld from the jury without the consent of the adverse party.¹

§ 1839. Formerly a rule prevailed, that if an instrument, on § 1637 being produced, appeared to be signed by *subscribing witnesses*, one of them at least *should be called* to prove its execution;² but this rule, after having worked gross injustice for a long course of years, was at length abrogated by the Legislature. The Common Law Procedure Act of 1854, among other enlightened provisions, contains the following clause:—"It shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."³ The first question, therefore, to be determined, when an attested document is tendered in evidence, is whether or not it be of such a nature as to *require attestation*. In a former chapter⁴ many statutes were referred to, which render attestation necessary, in order to give validity to particular instruments; but notwithstanding such reference, it will probably be deemed convenient to enumerate, in the present connexion, the principal documents, which must still be proved by calling one or more of the subscribing witnesses.

§ 1840. This list will be found to contain, first, all instruments § 1638 executed under powers, where the parties creating such powers have thought proper, for better security, to require the execution to be attested;⁵ and next, wills;⁶ warrants of attorney, and cognovits;⁷

¹ *Ld. Trimbletown v. Kemmis*, 9 Cl. & Fin. 763, 774, 775; *Evans v. Rees*, 10 A. & E. 151.

² *Doe v. Durnford*, 2 M. & Sel. 62; *Higgs v. Dixon*, 2 Stark. R. 180; *Currie v. Brown*, 3 Camp. 283.

³ 17 & 18 V., c. 125, § 26; extended by subsequent legislation "to all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence," whether in England or in Ireland; 17 & 18 V., c. 125, § 103; 19 & 20 V., c. 102, §§ 29, 98, Ir.; 28 & 29 V., c. 18, §§ 1, 7. See 2nd Rep. of Com. Law Commiss., p. 23, where the reasons for this change in the law are ably expounded.

⁴ Part ii., Ch. xviii.

⁵ See 2nd Rep. of Com. Law Commiss., p. 23.

⁶ Ante, § 1050.

⁷ Ante, § 1111.

bills of sale;¹ conveyances to charitable uses under the Mortmain Act;² leases under “the leasing powers Act for religious worship in Ireland, 1855;”³ certificates of searches and memorials, and some copies of enrolments, granted by the registrar of deeds and wills in Middlesex;⁴ appointments of trustees of property conveyed for religious or educational purposes;⁵ marriage registers;⁶ deeds of fathers appointing guardians of their children;⁷ assignments of bail bonds;⁸ protests of bills of exchange by persons not notaries;⁹ powers of attorney to transfer, or receive dividends on, colonial stock;¹⁰ and agreements between owners and drivers of metropolitan stage carriages.¹¹

§ 1841. Besides the documents just specified, all bills of sale of British¹² ships, together with agreements, alterations of agreements, releases, and indentures of apprenticeship, executed in conformity with the provisions of the Merchant Shipping Act of 1854,¹³ must respectively be attested; but, in these particular cases, the subscribing witnesses need not be called to prove the due execution of the instruments; for the statute contains, in § 526, an express enactment, that “Any document required by this Act to be executed in the presence of, or to be attested by, any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without the attesting witness or witnesses, or any of them.” § 1639

§ 1842. Notwithstanding the clear language of the Legislature, as cited above in § 1839, that “it shall *not* be necessary to prove by the attesting witness any instrument,” &c., a decision has been pronounced by Sir Richard Kindersley, which,—if reliance can be placed on the report in the “*Jurist*,”—goes far towards neutralising this most salutary provision. It seems, by the report, that in the case of *Reay’s Estate*,¹⁴ the Vice-Chancellor, after taking time to § 1640

¹ Ante, § 1110.

² Id.

³ 18 & 19 V., c. 39, § 10, cited ante, § 1110.

⁴ Ante, § 1645,

⁵ Ante, § 1110.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ 40 & 41 V. c. 59, § 4, subs. 1, and § 6.

¹¹ Ante, § 1099.

¹² Ante, § 994.

¹³ Ante, § 1098.

¹⁴ 1 Jur. N. S. 222. See, too, *Leigh v. Lloyd*, 35 Beav. 455.

consider, and consulting the other equity judges, has stated their unanimous opinion to be, that, in spite of the Act, a deed cannot be proved in *ex parte* cases, except by the attesting witness. Should any serious difficulty occur in obtaining such proof, special application may be made to the court, but in all ordinary occasions the evidence of the attesting witness will be regarded as necessary. It is to be hoped that this mischievous doctrine will not become established law; and indeed it has, at least on one occasion, been much shaken by a very able Vice-Chancellor.¹

§ 1843. The general rule which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable, that it applies even to a cancelled² or a burnt³ deed; as also to one, the execution of which is admitted by the party to it;⁴ and that, too, though such admission be deliberately made, either in open court,⁵ or in a subsequent agreement,⁶ or even in a sworn answer to interrogatories delivered to the party in the cause.⁷ Nay, a party in a cause who is called as a witness by his opponent, cannot be required, or even permitted to prove the execution by himself of any instrument, to the validity of which attestation is requisite, so long as the attesting witness is capable of being called.⁸ So, also, the attesting witness must be

¹ In re Mair's Estate, 42 L. J., Ch. 882, per Wickens, V.-C.

² Breton v. Cope, Pea. R. 41.

³ Gillies v. Smither, 2 Stark. R. 528.

⁴ Abbot v. Plumbe, 1 Doug. 216, referred to by Lawrence, J., in 7 T. R. 267, and in 2 East, 187; and confirmed by Ld. Ellenborough as an inexorable rule, in R. v. Harringworth, 4 M. & Sel. 353. See, also, Mounsey v. Burnham, 1 Hare, 15. A different rule prevails in India, and the Ind. Evid. Act of 1872 enacts, in § 70, that "the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

⁵ Johnson v. Mason, 1 Esp. 89, per Ld. Kenyon, citing Ld. Mansfield to the same effect.

⁶ Doe v. Penfold, 8 C. & P. 536, per Patteson, J. But see Bringloe v. Goodson, 5 Bing., N. C. 740, per Tindal, C. J., and post, § 1849.

⁷ See Call v. Dunning, 4 East, 53. But see Bowles v. Langworthy, 5 T. R. 366; and 1 Doug. 216, n. f. Also, post, § 1849.

⁸ Whyman v. Garth, 8 Ex. R. 803. Some persons may consider that the learned Barons, in this decision, have displayed a somewhat too stubborn resolution stare super antiquas vias.

called, though, subsequently to the execution of the deed, he has become blind;¹ and the court will not dispense with his presence on account of illness, however severe.² If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him before a commissioner or examiner,³ and if he be taken suddenly ill, a motion must be made to postpone the trial.⁴

§ 1844. The rule is equally applicable, whatever be the purpose for which the instrument is produced;⁵ but, though the witness must in the first instance be called, yet, as he is rather the witness of the court than of the party, great latitude will be allowed in the mode of examining him, and, if it be necessary, the judge will even permit questions in the nature of a cross-examination to be put.⁶ Moreover, the party calling him is not precluded from giving further evidence, in case he denies, or does not recollect, having seen the instrument executed.⁷ § 1612

§ 1845.⁸ On this rule, requiring the production of the subscribing witnesses, several *classes of exceptions* have been engrafted. *First*, when the *instrument is thirty years old*, the subscribing witnesses need not be called, as they are presumed to be dead.⁹ § 1643

¹ Cronk v. Frith, 9 C. & P. 197, per Ld. Abinger; 2 M. & Rob. 262, S. C., nom. Crank v. Frith; Rees v. Williams, 1 De Gex & Sm. 314, 320. See, *contrà*, Wood v. Drury, 1 Ld. Ray. 734; Holt, 734, S. C.; and Pedler v. Paige, 1 M. & Rob. 258, where Parke, B., reluctantly yielded to the authority of Ld. Holt. See *ante*, § 477.

² Harrison v. Blades, 3 Camp. 457, per Ld. Ellenborough; see, *contrà*, Jones v. Brewer, 4 Taunt. 46, where Sir J. Mansfield observes, that "perhaps in some cases of sickness," the handwriting of the attesting witness may be proved. See *ante*, § 477.

³ Rules of Sup. Ct., 1883, Ord. XXXVII., RR. 1, 5.

⁴ 3 Camp. 457.

⁵ Manners v. Postan, 4 Esp. 239, where the deed was used in evidence collaterally; R. v. Jones, 1 Lea. 174, where, upon an indictment against an apprentice for a fraudulent enlistment, the indenture was put in.

⁶ Bowman v. Bowman, 2 M. and Rob. 501, per Cresswell, J.; *ante*, § 1404, *ad fin.*

⁷ Levy v. Ballard, 3 Esp. 173, n.; Fitzgerald v. Elsee, 2 Camp. 635; Lemon v. Dean, *id.* 636, n.; Talbot v. Hodson; 7 Taunt. 251, overruling Phipps v. Parker, 1 Camp. 412.

⁸ Gr. Ev. § 570, in part.

⁹ *Ante*, § 87.

§ 1846. The *second exception* is, when the attesting witness has § 1644
signed the instrument merely in pursuance of a rule in some court,
 and such court has subsequently recognised the validity of the in-
 strument by *acting upon it*. Thus, where it was necessary for a
 defendant to prove that he had, as an insolvent, presented a petition
 for protection under the stat. 5 & 6 V., c. 116, the production of
 the petition and the proceedings in the Court of Bankruptcy duly
 sealed, whereby it appeared that the court had granted an order of
 protection, was held to be sufficient evidence, not indeed of the
contents of the petition, but of the *fact* of its having been presented,
 although an attorney, who had attested the petition by order of the
 Bankruptcy Court, was not called.¹ The special and very limited
 nature of this last exception will be better understood by referring
 to the case of *Streeter v. Bartlett*,² where the court refused to
 extend its operation. There, in order to prove an admission of a
 debt, the plaintiff tendered in evidence the certified copy of a
 schedule filed by the defendant in the Insolvent Debtors' Court,
 which contained an entry of such acknowledgment; but as this
 schedule, in accordance with a rule of the court where it was filed,
 was attested by the defendant's attorney, who was not called; and
 as, moreover, no proof was given that the Insolvent Debtors' Court
 had acted upon it, the judges of the Common Pleas determined
 that the evidence could not be received.

§ 1847. A *third exception* is when the instrument is proved to § 1645
 be in the *possession of the adverse party, who refuses to produce it*
pursuant to notice. In this case, the party who is driven to give
 secondary evidence of its contents need not call the attesting
 witness, though the plea be *non est factum*, and though the name
 of the witness were mentioned in the notice, and he be actually
 in court.³

§ 1848.⁴ A *fourth exception* is admitted when the *adverse party* § 1646

¹ *Bailey v. Bidwell*, 13 M. & W. 73.

² 5 Com. B. 562.

³ *Cooke v. Tanswell*, 8 Taunt. 450; *Poole v. Warren*, 8 A. & E. 588; 3 N. & P. 693, S. C. See ante, § 1818.

⁴ Gr. Ev. § 571, in part, as to first five lines.

producing a deed pursuant to notice, *claims an interest under it in the cause*. In such case, the party producing the instrument is not permitted to call on the other for proof of the execution; for, by claiming an interest under it, he admits its validity.¹ Still, this exception only applies when the party producing the deed claims under it *some interest in the subject-matter of the cause*;² and, therefore, where, in an action brought for commission due to the plaintiff as an agent in procuring for the defendant an apprentice, the deed of apprenticeship was produced under notice by the defendant, the plaintiff was held bound to call the attesting witness.³ So where a defendant, to prove himself a partner with the plaintiff, called upon him to produce a contract which they, as partners, had made with a builder, for work to be done on the plaintiff's premises; and, on its production, contended that the plaintiff claimed an interest under this instrument, inasmuch as it would enable him, if necessary, to control the builder's proceedings, or to enforce a specific performance against him, Lord Denman required proof of the execution, and the court confirmed his ruling.⁴ Moreover, to render a document admissible without proof as against the party producing it, his interests under it must be *still subsisting* at the time of the trial;⁵ and, possibly, this may have been the ground for the decision in *Collins v. Bayntun*,⁶ just cited, as it would seem from the report that the builder had executed the work agreed upon before the contract was produced by the plaintiff. Where both parties claim the same interest under a deed produced on notice, the party calling for its production need not prove its execution;⁷ and the fact that the party producing the instrument claims an interest under it, will sufficiently appear by a state-

¹ *Pearce v. Hooper*, 3 Taunt, 60; *Rearden v. Minter*, 5 M. & Gr. 204; *Carr v. Burdiss*, 1 C. M. & R. 784; *Orr v. Morice*, 3 B. & P. 139; 6 Moore, 347, S. C.; *Bradshaw v. Bennett*, 1 M. & Rob. 143, per Ld. Tenterden; 5 C. & P. 48, S. C.; *Coe v. Wainwright*, 5 A. & E. 520, 528; *Bell v. Chaytor*, 1 C. & Kir. 162; *Doe v. Hemming*, 9 D. & R. 15. See *Nagle v. Shea*, 1 R., 9 C. L. 389.

² *Doe v. M. of Cleveland*, 9 B. & C. 864, 869; *Curtis v. M'Sweeney*, Ir. Cir. R. 343.

³ *Rearden v. Minter*, 5 M. & Gr. 204. See *Gordon v. Secretan*, 8 East, 548.

⁴ *Collins v. Bayntun*, 1 Q. B. 117.

⁵ *Fuller v. Patrick*; 18 L. J., Q. B. 236.

⁶ 1 Q. B. 117.

⁷ *Knight v. Martin*, Gow, 46, per Dallas, C. J.

ment to that effect, made by his solicitor shortly before the trial.¹ The above exception does not extend to a case where a party, claiming an interest under a deed, gives it up to the adverse side some months,² or perhaps any time,³ before the action; because, in such case, the party wishing to make it evidence has had the instrument in his own custody, and may therefore well be prepared to prove its execution.

§ 1849. Where an instrument requires attestation, the acknowledgment of its validity by a party to it does not in general,—as before stated,⁴—waive the necessity of calling the attesting witness. Still, a few instances may be cited, in which a solemn admission by the adverse party *in reference to the cause* has been held in itself sufficient proof of execution; and these cases constitute the *fifth exception* to the rule. Thus, where a party agreed to admit a warrant of attorney “so as to enable his opponent to enter up judgment thereon,” the court held that judgment might be entered up without an affidavit of the subscribing witness.⁵ So, in an action on covenant, if the defendant pays money into court on one of the breaches, this is such an admission of the validity of the deed, as to dispense with the production of the attesting witness, though the execution be denied in the statement of defence.⁶ In like manner, if a party or his solicitor, in order to avoid expense, agree to admit the execution of an instrument which he is called upon by notice to admit, he cannot afterwards require that the attesting witness should be examined.⁷ It seems also, from one or two cases, that, if a party solemnly recites a deed or will in an instrument under his *seal*, and, moreover, has *acquired* some *benefit* on the faith of the document recited being valid, he cannot compel his opponent, who relies on the recited document, to prove its

¹ *Roe v. Wilkins*, 4 A. & E. 86; 5 N. & M. 434, S. C.

² *Vacher v. Cocks*, 1 B. & Ad. 147, 148.

³ *Carr v. Burdiss*, 1 C. M. & R. 785, per Parke, B.

⁴ *Ante*, §§ 414, 1843.

⁵ *Laing v. Kaine*, 2 B. & P. 85, per Ld. Eldon and Heath, J., Rooke, J. dubitante.

⁶ *Randall v. Lynch*, 2 Camp. 357, per Ld. Ellenborough.

⁷ *Freeman v. Steggall*, 14 Q. B. 203, per Coleridge, J. See *ante*, §§ 724A, 724B.

validity by calling the attesting witness.¹ So, if the effect of a memorandum indorsed upon an original agreement be to incorporate and make the whole one new agreement, it will suffice to prove the due execution of the memorandum, and the witness who has attested the original agreement need not be sworn.²

§ 1850. A *sixth* exception prevails, where a document is tendered in evidence as against a public officer, who is bound by law to have procured its due execution, and who has dealt with it as a document duly executed. For instance, where an action was brought under the old law³ against a sheriff for taking insufficient sureties on a replevin bond, it was held that the execution of that instrument need not be proved by calling the attesting witness, if the plaintiff could show that the sheriff had assigned the bond.⁴ § 1648

§ 1851.⁵ A *seventh* exception is recognised, where the party from *physical or legal obstacles is unable to adduce* the witness.⁶ Thus, if the witness be proved to be dead;⁷ or to be insane;⁸ or to be out of the jurisdiction of the court;⁹ or if he cannot be found § 1649

¹ *Bringloe v. Goodson*, 5 Bing. N. C. 738; 8 Scott, 71, S. C.; *Nagle v. Shea*, I. R., 9 C. L. 389; *Nash v. Turner*, 1 Esp. 217, per Ld. Kenyon. See *Fishmongers' Co. v. Robertson*, 1 Com. B. 67—71, and cases there cited.

² *Fishmongers' Co. v. Dimsdale*, 6 Com. B. 896; 12 Com. 557, S. C. in Ex. Ch.

³ Replevin bonds are now granted by the registrars of County Courts, and the jurisdiction of the sheriffs with respect to them has ceased. See 19 & 20 V., c. 108, §§ 63—66. They are exempt from stamp duty, 33 & 34 V., c. 97, Sched. ad fin. tit. "General Exemptions."

⁴ *Plumer v. Brisco*, 11 Q. B. 46; recognising *Scott v. Waithman*, 3 Stark. R. 168. See *Barnes v. Lucas*, Ry. & M. 264.

⁵ Gr. Ev. § 572, in some part.

⁶ See ante, §§ 472, 1843.

⁷ *Adam v. Kerr*, 1 B. & P. 360.

⁸ *Currie v. Child*, 3 Camp. 283, per Ld. Ellenborough; *Bennett v. Taylor*, 9 Ves. 381. See, also, 3 T. R. 712, per Buller, J.

⁹ *Barnes v. Trompowsky*, 7 T. R. 265; even though not proved to be domiciled abroad, *Prince v. Blackburn*, 2 East, 250; notwithstanding the power to examine on interrogatories under Ord. XXXVII., RR. 1 and 5 of Rules of Sup. Ct., 1883; *Glubb v. Edwards*, 2 M. & Rob. 300, per Maule, J.; *Wilson v. Collum*, 9 L. R. Ir. 150; and though the witness be in Dublin, *Doe v. Caper-ton*, 9 C. & P. 115, and *Hodnett v. Forman*, 1 Stark. R. 90. See 26 G. 3, c. 57, § 38. If the witness has set out to leave the kingdom, but the ship has

after diligent inquiry;¹ or if he have absented himself from the trial by collusion with the opposite party;² it will be sufficient, but perhaps not necessary in all cases,³ to prove his handwriting. If the instrument be lost, and the name of the subscribing witness be unknown,⁴ the execution must be proved by other evidence.

§ 1852. It is yet an undecided point whether an *eighth exception* § 1650 will not be allowed in favour of *instruments executed by corporations*, and whether such a document will not be sufficiently proved by merely showing that the seal affixed is the seal of the corporation, without calling the attesting witness.⁵

§ 1853. A *ninth exception* has, in several old cases,⁶ been § 1651 recognised in respect of *deeds*, the validity of which depends upon the fact of their being *enrolled*.⁷ No modern case has expressly decided this point, and though in practice it is still not unusual to admit such deeds on proof of enrolment, the principle of thus admitting them, except as against the party on whose acknowledgment they have been enrolled, has been questioned by Mr. Justice Buller.⁸ It is worthy of remark, that in the case of *Doe v. Lloyd*,

been beaten back, he is still considered absent. *Ward v. Wells*, 1 Taunt. 461. See, also, *Emery v. Twombly*, 5 Shepl. 65.

¹ *Cunliffe v. Sefton*, 2 East, 183; *Crosby v. Percy*, 1 Taunt. 364; *Ld. Falmouth v. Roberts*, 9 M. & W. 469; *Parker v. Hoskins*, 2 Taunt. 223; *In re Hux*, 46 L. J., P. D. & A. 39; *Burt v. Walker*, 4 B. & A. 697; *Spooner v. Payne*, 4 Com. B. 328; see post, § 1855.

² *Egan v. Larkin*, Arm. M. & O. 403, per Brady, C. B.; *Ld. Clanmorris v. Mullen*, *Crawf. & D. Abr. Cas.* 8; *Spooner v. Payne*, 4 Com. B. 328.

³ *R. v. St. Giles*, 22 L. J., M. C. 54; 1 E. & B. 642, S. C.; *In re Hux*, 46 L. J., P. D. & A. 39. See post, § 1861.

⁴ *Keeling v. Ball*, *Pea. Add. Cas.* 88.

⁵ *Moises v. Thornton*, 8 T. R. 307, per Lawrence, J.; *Doe v. Chambers*, 4 A. & E. 410; 6 N. & M. 539, S. C.

⁶ *Bro. Abr.*, *Faits enroll.* pl. 11, citing P. 7, E. 4, fol. 5, pl. 13, in which that point is distinctly laid down. See, also, *Lady Holcroft v. Smith*, 2 Freem. 259; 12 Vin. Abr. 43, 121; 5 Co. 54; 1 Keb. 117; *Thurle v. Madison*, Sty. 462; *Smartle v. Williams*, 3 Lev. 387; 1 Salk. 280, S. C.

⁷ See ante, § 1119, et seq. See, further, as to enrolments, ante, §§ 1645, 1650A, ad fin.

⁸ *B. N. P.* 255. "If divers persons seal a deed, and one of them acknowledges it, it may be enrolled, and may ever after be given in evidence as a deed

which was tried twice, and turned upon the validity of a deed enrolled under the Mortmain Act, the execution of the indenture was proved on both trials.¹

§ 1854. Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary to call *one* of them;² *excepting* in the case of *wills* relating to real estate, with respect to which it has for many years been the practice of courts of equity, and is now the practice of all the courts,³ to require that all the witnesses who are in England, and capable of being called, should be examined.⁴ The reasons for this exception appear to be, that frauds are frequently practised upon dying men, whose hands have survived their heads,—that therefore the sanity of the testator is the great fact to which the witnesses must speak when they come to prove the attestation,—and that the heir-at-law has a right to demand proof of this fact from every one of the witnesses whom the statute has placed about his ancestor.⁵ These will probably be deemed satisfactory reasons for the rule; but should the soundness of the reason admit of any doubt, the inflexibility of the rule admits of none. On such occasions, it used to be said that all the subscribing witnesses must be called in order to satisfy the conscience of the Lord Chancellor. § 1652

enrolled; but it would be of very mischievous consequence to say therefore, that a deed, enrolled upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by 10 A., c. 18.” See ante, § 419.

¹ 5 Bing. N. C. 742, and 1 M. & Gr. 683.

² *Holdfast v. Dowsing*, 2 Str. 1254; B. N. P. 264; *Hindson v. Kersey*, 4 Burn, Ec. L. 118, per Ld. Camden; *Gresl. Ev.* 120; *Forster v. Forster*, 33 L. J., Pr. & Mat. 113; *Belbin v. Skeats*, 1 Swab. & Trist. 148. See ante, § 393.

³ *Judicat. Act*, 1873, 36 & 37 V., c. 66, § 25, subs. 11, cited ante, p. 4, n. 5.

⁴ *McGregor v. Topham*, 3 H. of L. Cas. 155, per Ld. Brougham; *Bootle v. Blundell*, 19 Ves. 494; *Grayson v. Wilkinson*, 2 Ves. 459; *Townsend v. Ives*, 1 Wils. 216; *Ogle v. Cook*, 1 Ves. 177; *Andrew v. Motley*, 12 Com. B., N. S. 527, per Byles, J.

⁵ Per Ld. Camden, in *Hindson v. Kersey*, rep. in 4 Burn, Ec. L. 116, 119, 120, and cited *Gresl. Ev.* 123; *Bowman v. Bowman*, 2 M. & Rob. 501; *Andrew v. Motley*, 12 Com. B., N. S. 527, per Byles, J.

§ 1855.¹ The *degree of diligence* required in seeking for the subscribing witnesses is the same as in the search for a lost paper,² the principal being, in both cases, identical. The inquiry must be strict, diligent, and honest, and in all respects satisfactory to the court under all the circumstances. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; as also, in general, of his relatives and others, who may be supposed capable of affording information respecting him. A reference to one or two decisions will serve to illustrate this subject. In the case of the Earl of Falmouth *v.* Roberts³ the plaintiff relied upon an agreement, to which his steward was the attesting witness. This man, having been charged with embezzlement, had absconded, and could not be found, though inquiries were made for him at his house, and at the inns which he was in the habit of frequenting. The court held that this was sufficient search to let in evidence of his handwriting, although no application was shown to have been made to any member of his family. In another case, after proof that inquiry had been made at the residences of the parties to the instrument respecting the witness, and that no account could be obtained as to who he was, or where he lived, secondary evidence was admitted, though it was urged that, in such a case, a public advertisement for him should have been inserted in the newspapers.⁴ Again, in *Burt v. Walker*,⁵ the defendant's clerk was the witness to his bond, and on being subpoenaed for the plaintiff, he said that he would not attend. He, however, did attend, though apparently without any view of exhibiting himself as a witness; and the trial being put off, it was afterwards twice postponed on account of his absence, upon affidavits that he could not be found. Six weeks after the first postponement the cause was tried, when,

¹ Gr. Ev. § 574, in part as to first nine lines.

² Ante, § 429.

³ 9 M. & W. 469.

⁴ *Cunliffe v. Sefton*, 2 East, 183.

⁵ 4 B. & A. 697. For other instances, see *Wardell v. Fermor*, 2 Camp. 282; *Willman v. Worrall*, 8 C. & P. 380; *Wyatt v. Bateman*, 7 C. & P. 586; *Doe v. Powell*, id. 617; *Kay v. Brookman*, 3 C. & P. 555; *Morgan v. Morgan*, 9 Bing. 359; *Spooner v. Payne*, 4 Com. B. 328; *Austin v. Rumsey*, 2 C. & Kir. 736; ante, p. 1572. n. 1.

it appearing that search had been made for the witness at the defendant's house and in the neighbourhood, as also at Margate, to which place the defendant stated that he had gone, evidence of his handwriting was held to be admissible. In all cases of this nature, the answers to the inquiries may be given in evidence, they being not hearsay, but parts of the *res gestæ*.¹

§ 1856.² If the instrument be necessarily attested by *more than* § 1654 *one witness*, the *absence of them all* must be duly accounted for, in order to let in secondary evidence of the execution;³ but when such evidence is rendered admissible, proof of the handwriting of any *one* of the *witnesses* will, in general, be deemed sufficient, provided it be accompanied by some *evidence* of the *identity* of the party sued, with the person who appears to have executed the instrument.⁴ Proof of the signature of the obligor is an obvious, though by no means the only, mode of establishing his identity; and with the view of ascertaining the nature and amount of evidence which will be deemed sufficient for this purpose, a few cases on the subject of identity will here be noticed.

§ 1857. In *Jones v. Jones*,⁵ which was an action by the indorsee § 1655 against the maker of a note, the attesting witness stated that he saw a party called Hugh Jones, who kept the Glasgow Tavern at Llangefni, in Anglesea, sign the note; but he added, on cross-examination, that he had not seen this person since, and that the name was a common one in Anglesea. The court held that the plaintiff must be nonsuited, though the defendant had in one of his pleas admitted the making of the note; and Mr. Baron Parke observed, that the defendant's solicitor should have been called, to say whether the person who employed him in the case was the

¹ Ante, § 475.

² Gr. Ev. §§ 574, 575, in part, as to first seven lines.

³ *Cunliffe v. Sefton*, 2 East, 183; *Wright v. Doe d. Tatham*, 1 A. & E. 21, 22; *Whitlock v. Musgrove*, 1 C. & M. 511; 3 Tyr. 541, S. C.

⁴ *Adam v. Kerr*, 1 B. & P. 360; *Nelson v. Whittall*, 1 B. & A. 19; *Doe v. Paul*, 3 C. & P. 613.

⁵ 9 M. & W. 75, 79.

Hugh Jones who lived at the Glasgow Tavern. The case of *Greenshields v. Crawford*,¹ was a similar action against the acceptor of a bill, which was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford." A witness proved that this acceptance was the signature of Charles Banner Crawford, who was formerly a clerk in the East India House, but he did not know whether that Mr. Crawford was the defendant. The court held that this was sufficient evidence of identity, at least in the absence of an affidavit to show that the defendant was not that person. It will be seen that the only sensible distinction between these two cases, which were decided by the same court within a few months of each other, was, that in the former, the name of Hugh Jones was said to be common, whereas that of Charles Banner Crawford was certainly unusual.

§ 1858. In *Simpson v. Dismore*,² where an apothecary brought § 1656 his action for medicines and attendance, and, in order to prove that he had been duly admitted to practise, produced a licence from the Apothecaries' Company, which was granted to a person bearing his name, the Court held that no further evidence was necessary to show that he was the party named in the licence. In *Russell v. William Gray Smyth*,³ where the question was, whether the defendant was proved to be the same person as the defender in a Scotch suit, the judges decided that there was ample evidence of identity, on the ground that the names, professions, places of abode, and ages of the parties appeared to be the same. So, in *Smith v. Henderson*,⁴ which was an action on the case for negligence in navigation, it was objected that the evidence did not show that the defendant was the pilot in charge of the vessel; whereupon the plaintiff's counsel called out "Mr. Henderson," and a man in court answered "Here; I am the pilot." A witness then proved that this man, at the time of the accident, was acting as pilot. Mr. Baron Rolfe, thinking that this was not sufficient evidence of identity, directed a nonsuit, but the court above set it aside. Mr.

¹ 9 M. & W. 314.

² 9 M. & W. 47.

³ Id. 818, 819.

⁴ Id. 798.
(4448)

Baron Parke, during an argument, observed, "*similarity of name and residence, or similarity of name and trade, will do;*" and he added in the judgment, "The defendant is sued on the face of the *declaration* as William Henderson, a pilot. A man in court answers to the name of Henderson, is a pilot, and was proved to be the pilot acting on board the vessel. He therefore fulfils the description in the *declaration* in two respects at least, since his name and calling resemble those of the alleged defendant." ¹.

§ 1859. It may, however, here be observed, that the description in the statement of claim cannot properly be said to prove the identity of the defendant. The question is, who was served with the writ, and who has pleaded to the action? and it is obvious that no description which the plaintiff chooses to introduce into his statement of his own case, can in strictness answer this question, or affect the defendant's interest. This remark is made, because in the case above-mentioned of *Greenshields v. Crawford*, the court appears to have acted upon a similar mistake. The decision in *Smith v. Henderson* was right, not because the defendant was described by the plaintiff as a pilot, but because the accident was proved to have been caused by a pilot named Henderson, and a person answering the name and description was *present in court*, and might therefore be fairly presumed to be the same Mr. Henderson who had pleaded to an action. In another case, in which a witness, called to prove the defendant's handwriting, had corresponded with a person bearing his name, who dated his letters from Plymouth Dock, where the defendant resided, and where it appeared that no other person of the same name lived, the evidence of identity was held to be sufficient; ² and in *Warren v. Sir. J. C. Anderson, Bart.*,³ where the only proof of the defendant's signature to a bill was given by a clerk of Messrs. Coutts, who stated that two years before the trial he saw a person, whom he did not know, but who called himself Sir J. C. Anderson, Bart., sign his name,—that he had since seen cheques similarly signed pass through the banking house, and that he thought the handwriting was the same as that on the bill,—

¹ 9 M. & W. 801.

² *Harrington v. Fry, Ry. & M.* 90, per Best, C. J.
(4449)

³ 8 Scott, 384.

the court held that the evidence, weak as it confessedly was, might be submitted for the consideration of the jury.

§ 1860. It only remains to notice two decisions in the Court of § 1658
Queen's Bench, which, recognised as they have been by the other courts,¹ go far towards neutralizing an objection, which has too often been permitted to shield the unprincipled. The cases referred to are *Sewell v. Evans*, and *Roden v. Ryde*.² In the first of these the defendant's name was William Leal Evans; in the second, Henry Thomas Ryde; and in neither was any evidence adduced beyond the similarity of name identifying the person whose signature was proved with the party upon whom process had been served. The court held that no proof was necessary, observing, that if the party to be fixed with liability was a marksman, as in the case of *Whitelocke v. Musgrove*,³ or if his name was proved to be very common in the country, as in the case of *Jones v. Jones*,⁴ or if a length of time had elapsed since the name was signed, or if, in short, any other special facts were involved in the case, a stricter proof might be required: but that in ordinary cases, where no particular circumstances tended to raise a question as to the party being the same, *mere identity of name was something from which an inference might be drawn*.⁵ Lord Denman, —after stating that the onus of proving a negative in these cases might be safely thrown upon the defendant, partly because the proof was easy, and partly, because the supposition that a wrong man had been sued was unreasonable, inasmuch as the fraud would occur to few, and the risk of punishment in practicing the fraud would be great,—emphatically added, “The transactions of the world could not go on if such an objection were to prevail. It is unfortunate that the doubt should have been raised; and it is best that we should sweep it away as soon as we can.”

¹ See *Hamber v. Roberts*, 7 Com. B. 861.

² 4 Q. B. 626; 3 G. & D. 604, S. C.

³ 1 C. & M. 511; 3 Tyr. 541, S. C.

⁴ 9 M. & W. 75. See, also, *Barker v. Stead*, 3 Com. B. 946.

⁵ See, also, *Murieta v. Wolfhagen*, 2 C. & Kir. 744, per Alderson, B.; and *Reynolds v. Staines*, id. 745.

⁶ 4 Q. B. 633.

§ 1861. It has been held in America, that where the absence of the subscribing witnesses has been duly accounted for, the instrument may be read upon proof of the handwriting of the obligor, or party by whom it was executed; but it seems to be still undecided in that country, whether such proof will be admissible, without first showing an inability to prove the signatures of the witnesses.¹ § 1659

§ 1862. When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the *writer* himself, or some person who *actually saw the paper or signature written*. When such evidence cannot be procured, as must often be the case, recourse may be had, either to the testimony of witnesses, who are *acquainted with the handwriting*, or to a comparison of the document in dispute with any writing proved to the satisfaction of the judge to be genuine.² § 1660
These last modes of proof, indeed, may, in all cases be given in the first instance, since the law recognises no distinction between them and the ocular proof just mentioned; but as they are obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise a suspicion, that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

§ 1863. The *knowledge of a person's handwriting* may have been acquired in both or either of two ways.³ The *first is from having seen him write*; and though the weight of the evidence, which depends upon knowledge so obtained, must of course vary in degree according to the number of times that the party has been seen to write, the interval that has elapsed since the last time, the circumstances, whether of hurry or deliberation, under which he wrote, and the opportunities and motives which the witness had § 1661

¹ Jackson v. Waldron, 11 Wend. 178, 183, 196, 197; Valentine v. Piper, 22 Pick. 90. See, also, R. v. St. Giles, 22 L. J., M. C. 54; 1 E. & B. 642, S. C., as to the English law.

² See post, § 1869.

³ See 3 Benth. Ev. 598, 599.

for observing the handwriting with attention;¹ yet the evidence will be admissible, though the witness has not seen the party write for twenty years,² or has seen him write but once, and then only his surname.³ Indeed, on one occasion, a witness was permitted to speak to the genuineness of a person's *mark*, from having frequently seen it affixed by him on other documents.⁴ The proof in such cases may be very slight, but the jury will be allowed to weigh it. The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands.⁵ Still, the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded; though if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of the handwriting, the testimony will be rejected.⁶ Where a witness, called to establish a forgery, had become acquainted with the signature of the party, from having seen him, after the commencement of the suit, sign his name for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon justly observing, that the party might, through design, have written differently from his common mode of signature.⁷

§ 1864. The *second way* in which the knowledge of a person's § 1662

¹ Doe v. Suckermore, 5 A. & E. 730, per Patteson, J.

² R. v. Horne Tooke, 25 How. St. Tr. 71, 72; Eagleton v. Kingston, 8 Ves. 473, 474, per Ld. Eldon.

³ 5 A. & E. 730, per Patteson, J.; Garrells v. Alexander, 4 Esp. 37, per Ld. Kenyon; Willman v. Worrall, 8 C. & P. 380; Burr v. Harper, Holt, N. P. R. 420; Lewis v. Sapio, M. & M. 39. In this last case, Ld. Tenterden refused to recognise the authority of Powell v. Ford, 2 Stark. R. 164, where Ld. Ellenborough rejected the testimony of a witness who had seen the defendant write his surname only once, the acceptance of the bill in question having been signed at full length. See, also, Warren v. Anderson, 8 Scott, 384.

⁴ George v. Surrey, M. & M. 516, per Tindal, C. J., after some hesitation.

⁵ Moody v. Rowell, 17 Pick. 419, overruling Slaymaker v. Wilson, 1 Pennsylv. 216.

⁶ R. v. Murphy, 8 C. & P. 306, 307, per Coleridge, J.; Da Costa v. Pym, Pea. Add. Cas. 144, per Ld. Kenyon.

⁷ Stanger v. Searle, 1 Esp. 15. See also, Page v. Homans, 2 Shepl. 478.

handwriting may be acquired, is by the *witness having seen, in the ordinary course of business, documents, which by some evidence, direct or circumstantial, are proved to have been written by such person*. Thus, if the witness has received letters purporting to be in the handwriting of the party, and has either personally communicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and the party, as to induce a reasonable presumption in favour of their genuineness, his evidence will be admissible.¹ So, if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is, that the answer was written by the person addressed in the letter; and, consequently, the witness who received such answer, may be examined as to the genuineness of any other paper, which it is necessary to show was or was not written by the same person.² Again, the clerk who has constantly read the letters, or the broker who has been consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters; and a servant who has habitually carried his master's letters to the post, has thereby had an opportunity of obtaining a knowledge of his writing, though he never saw him write, or received a letter from him.³

§ 1865. In one case, an attorney was permitted to speak to the signature of an attesting witness, though his knowledge of the handwriting was solely derived from having seen the same signature attached to an affidavit, which had been filed by the opposite party in a previous stage of the cause.⁴ Here the opposite party,

¹ Doe v. Suckermore, 5 A. & E. 731, per Patteson, J.; 2 N. & P. 46, S. C.; Ld. Ferrers v. Shirley, Fitzg. 195; B. N. P. 236; Carey v. Pitt, Pea. Add. Cas. 130; Tharpe v. Gisburne, 2 C. & P. 21; Harrington v. Fry, Ry. & M. 90; Burr v. Harper, Holt, N. P. R. 420; Com. v. Carey, 2 Pick. 47; Johnson v. Daverne, 19 Johns. 134; Pope v. Askew, 1 Iredell, 16.

² Carey v. Pitt, Pea. Add. Cas. 130, per Ld. Kenyon.

³ Doe v. Suckermore, 5 A. & E. 740, per Ld. Denman.

⁴ Smith v. Sainsbury, 5 C. & P. 196, per Park, J., cited by Ld. Denman in Doe v. Suckermore, 5 A. & E. 740.

having used the affidavit as a genuine document, was in a manner estopped from disputing the fact that it was signed by the person whose signature it bore; but, perhaps, after all, some doubt may be entertained respecting the correctness of this decision; since in another case, the plaintiff's attorney was not allowed to prove the defendant's handwriting, though he had frequently seen and acted upon other papers in the Master's office, which the opposite attorney admitted had been written by the defendant.¹

§ 1866. Where in an action on a joint and several promissory note against three persons, the signature of one of them was attempted to be proved by calling the solicitor for the defendants, whose knowledge of the handwriting in question was founded on the circumstance, that he had received a retainer purporting to be signed by his three clients, and had acted upon it in defending the action, the Court held that his testimony was inadmissible, as no proof was given that the party had ever acknowledged the signature to the solicitor, and either of the other two defendants might have signed the retainer for him with his assent.² So, the testimony of an inspector of franks, called to prove the handwriting of a member of Parliament, has on two occasions been rejected, where the knowledge of the witness was simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but where he had never communicated with the member on the subject of the franks; for, in this case, the superscriptions of the letters seen by the witness might possibly have been forgeries.³ These last decisions certainly carry the law to the verge of impropriety, since they are founded on a presumption, which is not only improbable in the highest degree, but is in direct contradiction to the sound rule, that a crime is not to be presumed, or so much as suspected, without special cause, in any single instance; much less in a number of unconnected instances.⁴

¹ Greaves v. Hunter, 2 C. & P. 477, per Abbott, C. J.

² Drew v. Prior, 5 M. & Gr. 264.

³ Carey v. Pitt, Pea. Add. Cas. 130, per Ld. Kenyon; Batchelor v. Honeywood, 2 Esp. 714, per id.

4 3 Benth. Ev. 604.

§ 1867. In whichever of these two ways the witness has acquired his knowledge of handwriting, it is obvious that evidence identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either aliunde or by the testimony of the witness himself, if he be personally acquainted with the writer.¹ The witness might otherwise be proving the handwriting of one man, while the party calling him might be seeking to establish the signature of another. § 1665

§ 1868. When witnesses are called to speak to handwriting they should declare their *belief* on the subject, though in one case it was held by Lord Kenyon, that the evidence of a witness, who, acknowledging his inability to form a belief, merely stated that the paper produced was *like* the handwriting of the individual by whom it purported to have been written, was admissible.² This case,—though recognised by Lord Wynford,³—has been questioned by Lord Eldon,⁴ and apparently with reason. It may be very true, as Lord Eldon admits, that witnesses are occasionally pressed too much to form a belief;⁵ and some allowance should certainly be made for the over-caution of a scrupulous witness; but though it may be very proper to receive the testimony of a person, who, declining to express a decided belief, will yet declare that he is of *opinion*, or that he *thinks*, the paper is genuine, yet it is going a step further when the witness will only state that the handwriting is like; a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger. § 1666

§ 1869. Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison;—it being the belief which a witness entertains, upon comparing the writing in question with an exemplar § 1667

¹ See *Doe v. Suckermore*, 5 A. & E. 731, per Patteson, J.

² *Garrells v. Alexander*, 4 Esp. 37. See, also, *Beauchamp v. Cash, D. & R.*, N. P. R. 3.

³ 2 Ph. Ev. 249, n. 2.

⁴ *Eagleton v. Kingston*, 8 Ves. 476. See, also, *Cruise v. Clancy*, 6 Ir. Eq. R. 552.

⁵ *Eagleton v. Kingston*, 8 Ves. 476.

formed in his mind from some previous knowledge;¹—the law, until the year 1854, did not allow the witness, or even the jury, except under certain special circumstances, actually to *compare two writings* with each other, in order to ascertain whether both were written by the same person. This technical rule of the common law,—which was certainly *not* based on common sense, and which was directly opposed to the practice of our own ecclesiastical courts,² of our courts in India,³ of the French courts,⁴ and of the courts of many of the most enlightened States in America,⁵—was, happily for the administration of justice, abrogated by the Legislature in the year just named, so far at least as related to trials at *Nisi Prius*.⁶ In 1865, a further instalment of law Reform was embodied in the Act of 28 & 29 V., c. 18, which enacts in § 8, that

¹ *Doe v. Suckermore*, 5 A. & E. 731, per Patteson, J.

² 1 Will. on Ex. 309; 1 Ought. tit. 225, §§ 1—4; *Doe v. Suckermore*, 5 A. & E. 708—710, per Coleridge, J.; *Beaumont v. Perkins*, 1 Phillim. 78; *Saph v. Atkinson*, 1 Add. 215, 216; *Machin v. Grindon*, 2 Cas. temp. Lee, 335; 2 Add. 91, n. a, S. C.

³ The Ind. Evid. Act of 1872 contains, in § 73, the following enactment:—“In order to ascertain whether a signature, writing, or seal, is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.”

⁴ Code de Proc. Civ., part 1, liv. 2, tit. 10, §§ 193—213; 3 Poth., Œuvr. Posth. 46; *Doe v. Suckermore*, 5 A. & E. 710, 711, per Coleridge, J.

⁵ The N. York Civ. Code contains the following sections relative to the proof of handwriting: “§ 1763. The handwriting of a person may be shown by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting. § 1764. Evidence respecting the handwriting may also be given by a comparison, made by the witnesses, or a jury, with writings, admitted or treated as genuine by the party against whom the evidence is offered. § 1765. Where a writing is more than thirty years old, the comparison may be made with writings, purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.” In Massachusetts, Maine, and Connecticut, it seems to have become the settled practice to admit any papers to the jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting. *Homer v. Wallis*, 11 Mass. 309; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315; *Hammond's case*, 2 Greenl. 33; *Lyon v. Lyman*, 9 Conn. 55.

⁶ 17 & 18 V., c. 125, §§ 27, 103. See, also, 19 & 20 V., c. 102, §§ 30, 98, Ir. (4456)

“comparison of a disputed writing with any writing proved to the satisfaction of the *judge* to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witness respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.” § 1 of the same Act provides, that the above enactment, —in common with certain other clauses relating to evidence,— “shall apply to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland.”¹

§ 1870. Under this statutory law it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge,² may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause;³ and next, that the comparison may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or, without the intervention of any witnesses at all, by the jury themselves,⁴ or, in the event of there being no jury, by the court. If, therefore, an action be brought by the indorsee of a bill of exchange against the acceptor, who by his statement of defence has denied the indorsement by the drawer, it seems that the jury may, by simply comparing the indorsement with the drawing, which is conclusively admitted to be genuine,⁵ find a verdict for the plaintiff, even though no witness be called to disprove the defence.⁶ § 1668

§ 1871. It further appears, that any person whose handwriting is in dispute, and who is present in court, may be required by the § 1669

¹ This rule has been adopted by the Committee for Privileges in the House of Lords. *Shrewsbury Peer.*, 7 H. of L. Cas. 1, 15.

² See *Egan v. Cowan*, 30 Law Times, 223, in Ir. Ex.

³ *Birch v. Ridgway*, 1 Fost. & Fin. 270; *Cresswell v. Jackson*, 2 Fost. & Fin.

⁴ *Cobbett v. Kilminster*, 4 Fost. & Fin. 490, per Martin, B.

⁵ *Ante*, § 851.

⁶ See as to the former law, *Allport v. Meek*, 4 C. & P. 267.

judge to write in his presence, and that such writing may be compared with the document in question.¹ Moreover, in all cases of comparison of handwriting, the witness, the jury, and the court may respectively exercise their judgment on the resemblance or difference of the writings produced, with respect to the general character of the handwriting,—the forms of the letters, and the relative number of diversified forms of each letter,—the use of capitals, abbreviations, stops, and paragraphs,—the mode of effecting erasures, or of inserting interlineations or corrections,—the adoption of peculiar expressions,—the orthography of the words,²—the grammatical construction of the sentences,—and the style of the composition,—and also on the fact of one or more of the documents being written in a feigned hand.³

§ 1872. In one respect, the enactment under discussion seems open to objection. If the word “genuine,” as applied to a document, simply means,—and it can scarcely have any other meaning,—that it is in the handwriting of the person by whom it purports to have been written, the Legislature has made no provision for the case of a party who seeks to *disprove* his signature to a receipt, bill, or other document, by comparing it with papers written by him post litem motam. This will open a door to fraud

¹ See *Doe d. Devine v. Wilson*, 10 Moo. P. C. R. 502, 530; *Cobbett v. Kilminster*, 4 Fost. & Fin. 490, per Martin, B. The Ind. Evid. Act, 1872, contains, in § 73, the following enactment:—“The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.”

² This is a test which may often be successfully applied. At the Greenwich County Court a plaintiff, on one occasion, denied most positively that a receipt produced was in his handwriting. It was thus worded:—“Received the Hole of the above.” On being asked to write a sentence in which the word “whole” was introduced, he took evident pains to disguise his writing, but he adopted the above *phonetic* style of spelling, and also persisted in using the capital H. On being subsequently threatened with an indictment for perjury he absconded.

³ “The handwriting of Junius professionally investigated by Mr. Charles Chabot, Expert,” is the most instructive and scientific essay that has ever been published in English respecting the best methods to be adopted in comparing handwritings. It deserves the most attentive study, and it quite exhausts the subject. See *Handw. of Jun. by Twistleton & Chabot*, quarto, published by Murray in 1871.

Many men are capable of writing in several different hands; and, consequently, when the object they have in view is to relieve themselves from liability, nothing can be easier than to produce to the jury genuine documents, which have been written for the express purpose of proving that no similitude exists between them and the writing in dispute.¹

§ 1873. Another matter which appears to have been overlooked § 1671 by the Legislature, relates to the question, how far the knowledge of a witness, who is called to prove handwriting, may be *tested* in cross-examination by showing him other documents, not admissible as evidence in the cause, nor proved to be genuine, and by then asking him whether they were written by the same hand as the paper in dispute. If the witness in such a case were to express his belief that all the documents were in the same handwriting, could the cross-examining counsel prove that those produced by him were *not* genuine, and then put them in evidence, that the jury might be enabled to appreciate the testimony given by the witness? On this subject, the authorities, prior to the alteration of the law effected by the Acts passed in 1854, and 1865,² are conflicting,³ and it is difficult to conjecture in what way the judges would now decide. The admission of the evidence, would, however, seem best to accord with the spirit of the new law.

§ 1874. When *documents* are of such *antiquity* that witnesses § 1672 who have corresponded with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases.⁴

¹ Ld. Brogham's Bill of 1853 contained the following clause to avoid this evil:—"Where the handwriting of any person is sought to be *disproved* by comparison with other writings of his, not admissible in evidence for any other purpose in the cause, such writings, before they can be compared with the document in question, must, if sought to be used by the party in whose handwriting they are, be proved to have been written prior to any dispute respecting the genuineness of such document." See ante, § 1863, ad fin.

² See ante, § 1869.

³ See and compare *Hughes v. Rogers*, 8 M. & W. 125; *Griffits v. Ivory*, 11 A. & E. 322; 3 P. & D. 179, S. C.; *Young v. Honner*, 2 M. & Rob. 537; 1 C. & Kir. 51, S. C., nom. *Younge v. Honner*.

⁴ *Doe v. Suckermore*, 5 A. & E. 717, 718, per Coleridge, J.; 724, 725, per Williams, J.; 736, per Patteson, J.; 747, 748, per Ld. Denman.

Such documents, when thirty years old, generally prove themselves;¹ but still occasions may arise when, in order to establish identity, it will become necessary to prove the handwriting. For instance, if in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence, the handwriting must be proved in some legal mode, however ancient the paper may be.² How, then, is this to be done? Doubtless, under the Act of 28 & 29 V., c. 18, § 8,³ the proof may be established by producing from the proper custody other documents admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and by then permitting witnesses, whether experts or others, and the court and jury to compare such documents directly with the paper in dispute.⁴ It is also clear that, without the production of any documents for the purpose of instituting a direct comparison, the handwriting under investigation may be proved by any witness, who has become acquainted with it in the *ordinary course of his business*.

§ 1875. This point was decided by the House of Lords on the claim of Sir B. W. Bridges to the barony of Fitzwalter.⁵ There, it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years before by an ancestor of the claimant, was written by him. To establish this fact, the family solicitor of the claimant was called; and on his stating that he had acquired a knowledge of the ancestor's writing, from having had occasion at different times to examine, in the course of his business, many deeds and other

¹ Ante, §§ 87, 88.

² Tracy Peer., 10 Cl. & Fin. 154; Fitzwalter Peer., id. 193; Morewood v. Wood, 14 East, 328; Taylor v. Cook, 8 Price, 652.

³ Ante, § 1869.

⁴ This course was allowable to a great extent under the old law. See Davies v. Lowndes, 7 Scott, N. R. 168, 169, 209; Doe v. Traver, Ry. & M. 143, per Abbott, C. J.; Anon., cited id., per Lawrence J.; Roe v. Rawlings, 7 East, 282, n., per Le Blanc, J., on two occasions; Morewood v. Wood, 14 East, 328, per Hotham, B.; 20 Law Mag. 323, 324; Taylor v. Cook, 8 Price, 652, 653, per Richards, C. B.

⁵ Fitzwalter Peer., 10 Cl. & Fin. 193. See Crawford & Lindsay Peer., 2 H. of L. Cas. 556—558.

instruments purporting to have been written or signed by him, the Lords considered this witness competent to prove the handwriting of the pedigree. In another case,¹ where in order to prove a pedigree, it became necessary to rely upon a marriage certificate, which purported to have been written and signed eighty-five years before the trial by W. Davies, the then curate of the parish, the Court of Queen's Bench held that the document was admissible, on proof by the parish clerk, that in the course of his official duty he had acquired a knowledge of the handwriting of Mr. Davies, from various signatures in the original register. It was objected that some witness should have been called to speak to the death of the curate, or to have shown when he died, or at least that some search should have been made for persons who might have seen him write, or have been able to prove his signature in the ordinary way; but the objections were overruled as untenable.

§ 1876. But the question still remains, can a witness, in the cases just put, be called to state that he has acquired a knowledge of the handwriting in question, *not* from a *course of business*, like a party's solicitor or steward, but from *studying* the signatures attached to documents, which are either admitted or proved to be genuine, but which are *not produced*, for the *express purpose* of speaking to the identity of the writer? The House of Lords in the Fitzwalter Peerage case² decided,—in apparent opposition to several older authorities,³—that such testimony was inadmissible, and the new practice established by the Common Law Procedure Act, 1854,⁴ does not seem to have interfered with this decision. § 1674

§ 1877. Independent of all cases in which handwriting is sought to be proved by actual comparison, the testimony of skilled witnesses will occasionally be admissible for the purpose of throwing light upon the document in dispute. First, if the writing be *ancient*, an expert may state his belief as to the probable *period* at which it was § 1678

¹ Doe v. Davies, 10 Q. B. 314.

² 10 Cl. & Fin. 193.

³ See Sparrow v. Farrant, 2 St. Ev. 517, n. c, per Holroyd, J.; Doe v. Lyne, 2 Ph. Ev. 258, n. 1, per id; Beer v. Ward, cited id., per Dallas, C. J., and Ld. Tenterden; Anon., per Ld. Hardwicke, cited B. N. P. 236, b; Doe v. Suckermore, cited ante, p. 1587, n. 4.

⁴ Ante, § 1869.

written, because, in such a case, as the character of handwriting varies according to the progress of civilization, antiquarian knowledge may afford much assistance in arriving at a right conclusion.¹ Secondly, if the question be whether a paper is written in a *feigned* or natural hand,² witnesses whose duty it has been to detect forgeries will probably be admissible in this country,³ as they certainly are in America,⁴ on the ground that such persons are supposed to be more capable than ordinary men of pronouncing a safe opinion on a subject of this nature.⁵ Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little weight will in general be attached to the evidence which they give,⁶ unless it be obviously based on sensible reasoning.

§ 1878. Although in ordinary cases, when a witness is called to speak to handwriting, the document itself is produced in court, it is obvious that this course may occasionally be highly inconvenient or even impossible. For instance, suppose it be necessary to identify a person, who has either written a paper which is lost, or has signed a record or public register, the removal of which from its proper place of custody cannot be enforced,—will a witness be allowed to prove such person's handwriting without producing the original document? This point was raised and decided in the affirmative in *Sayer v. Glossop*,⁷ where the defendant, having pleaded her coverture, and having put in an examined copy of the register of her marriage with one A. B., was permitted, without producing the

¹ *Doe v. Suckermore*, 5 A. & E. 718, per Coleridge, J.; *Tracy Peer.*, 10 Cl. & Fin. 154.

² Those who feel an interest in tracing a similarity between feigned and natural handwriting, are referred to the 4th vol. of *Ld. Chatham's Corresp.*, where, at p. 37 of the fac-similes of autographs, they will find a curious comparison of the upright writing of Junius with the running-hand of Sir Ph. Francis. See, also, ante, § 1871, n. 3.

³ *R. v. Coleman*, 6 Cox, 163, per Cresswell, J.

⁴ *Hammond's case*, 2 Greenl. 33; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Carey*, 2 Pick. 47; *Lyon v. Lyman*, 9 Conn. 55; *Hubly v. Vanhorne*, 7 Serg. & R. 185; *Lodge v. Phipper*, 11 Serg. & R. 333.

⁵ *R. v. Cator*, 4 Esp. 117, 145, per Hotham, B.; *Goodtitle v. Braham*, 4 T. R. 497; *Doe v. Suckermore*, 2 N. & P. 18; *Fitzwalter Peer.*, 10 Cl. & Fin. 198, per *Ld. Brougham*.

⁶ *Tracy Peer.*, 10 Cl. & Fin. 101, per *Ld. Campbell*; *Gurney v. Langlands*, 5 B. & A. 330.

⁷ 2 Ex. R. 409.

original register, to call a witness, who deposed that he knew one A. B., and had often seen him write; and that the husband's signature in the register, which he had examined, was in the handwriting of his friend A. B.

§ 1879. A bold attempt was made in the year 1868, and again in § 1679A the year 1875, to facilitate the reading of documents on trials in the County Courts, by waiving the necessity of producing any formal proof in their support.¹ Both these attempts failed, owing to want of skill in the draughtsmen who respectively framed the rules by which the object was sought to be effected. However, in 1883, a new rule was promulgated, which, at last, has partially succeeded, and which is in the following form:—"Where any documents, which would, if duly proved, be admissible in evidence, are produced to the court from proper custody, they shall be read without further proof, if, in the opinion of the judge, they appear genuine, and if no objection be taken thereto; and if the admission of any *document so produced* be objected to, the judge may adjourn the hearing for the *proof* of the documents, and the party objecting shall pay the costs caused by such objection, in case the documents shall afterwards be proved, unless the judge shall otherwise order."²

§ 1880.³ The *admissibility* and *effect* of private writings, when § 1680 offered in evidence, have been incidentally considered, under various heads, in the preceding pages, so far as they are established and governed by any rules of law. On this subject, therefore, no further comments are necessary.

§ 1881. Still, it may be convenient here to advert to *six practical* § 1681 *rules* of some importance, all of which will be found applicable to evidence of every description. *First*, where evidence is offered for a *particular purpose*, and an objection is taken to its admissibility for that purpose, if the judge pronounces in favour of its *general*

¹ Cy. Ct. R. O. & F. of 1868, R. 103; Cy. Ct. R. 1875, Ord. xiv, R. 5.

² Cy. Ct. R. 1883, R. 10.

³ Gr. Ev. § 583, in part.

admissibility in the cause, the court will support his decision, provided the evidence be admissible for *any purpose*.¹ The proper course for the opposing counsel to take in such a case would seem to be, to call upon the judge to explain to the jury, that the evidence, though generally admissible in the cause, furnishes no proof of the particular fact in question; and then, should the judge refuse to make the explanation required, an application might be made to the court above for a new trial on the ground of misdirection.² *Secondly*, where inadmissible evidence is received at the trial *without objection*, the opposite party cannot afterwards object to its having been received,³ or obtain a new trial on the ground that the judge did not expressly warn the jury to place no reliance upon it.⁴ *Thirdly*, where evidence is objected to at the trial, the *nature of the objections* must be distinctly stated, whether an exception be entered on the record or not;⁵ and on either moving for a new trial on account of its improper admission, or on arguing the exception, the counsel will not be permitted to rely on any other objections than those taken at *Nisi Prius*.⁶

§ 1882. *Fourthly*, where evidence is tendered at the trial on an untenable ground, and is consequently rejected, the court will not grant a new trial merely because it has since been discovered that the evidence was admissible on another ground; but the party must go much further, and show, first, that he could not by due diligence have offered the evidence on the proper ground at the trial, and next, that manifest injustice will ensue from its rejection. § 1682

¹ *The Irish Society v. Bp. of Derry*, 12 Cl. & Fin. 641, 655.

² *Id.* 672—674, per *Ld. Brougham*.

³ *Reed v. Lamb*, 29 L. J., Ex. 452; 6 H. & N. 75, S. C.

⁴ *Goslin v. Corry*, 7 M. & Gr. 342; *Doe v. Benjamin*, 9 A. & E. 644.

⁵ A bill of exceptions cannot be tendered on a criminal trial, *R. v. Esdaile*, 1 Fost. & Fin. 213, 228, per *Ld. Campbell*. Such bills were also abolished in civil causes by Rules of Supr. Ct., 1875, Ord. LVIII., R. 1. But the same object may be gained "by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record," 38 & 39 V., c. 77, § 22. This somewhat contradictory Legislation would seem to be a silly trifling with words.

⁶ *Williams v. Wilcox*, 8 A. & E. 314, 337; *Ferrand v. Milligan*, 7 Q. R. 730; *Bain v. Whitehaven & Furness Junct. Ry. Co.*, 3 H. of L. Cas. 1, 15—17, per *Ld. Brougham*.

His position, at the best, is that of a party who has discovered fresh evidence since the trial.¹ *Fifthly*, where evidence is rejected at the trial, the party proposing it should *formally tender* it to the judge, and request him to make a note of the fact; and, if this request be refused, he should then require an exception to be entered upon or annexed to the record; or, if there be no record, as in the Probate Division of the High Court, he must apply to the Court of Appeal for an order directing a notice of appeal to be given.² If neither of these courses has been pursued, and the judge has no note on the subject, the counsel cannot afterwards complain of the rejection of the evidence.³ *Lastly*, though evidence has been improperly admitted or rejected at Nisi Prius, or the judge has omitted to put to the jury a question which he was not asked to leave to them, the court will not grant a new trial, unless in its opinion "some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties."⁴ As it was considered very doubtful whether this last

¹ Doe v. Bevis, 18 L. J., C. P. 128; 7 Com. B. 456, S. C.

² Cheese v. Lovejoy, L. R., 2 P. D. 161, per Ct. of App.

³ Gibbs v. Pike, 9 M. & W. 351, 360, 361; Whitehouse v. Hemmant, 27 L. J., Ex. 295; Penn v. Bibby, 36 L. J., Ch. 455, 461, per Ld. Chelmsford, Ch.

⁴ Rules of Supr. Ct., 1883, Ord. XXXIX., R. 6. The Scotch law on this subject is embodied in § 45 of 13 & 14 V., c. 36, which enacts, that "a bill of exceptions shall not be allowed in any cause before the Court of Session, upon the ground of the undue admission of evidence, if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict than that actually pronounced; and it shall not be imperative on the Court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have effected the result at which the jury by their verdict have arrived." The Indian Evid. Act of 1872, contains also, in § 167, the following enactment:—"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision." See Hodson v. Mid-Gt. W. Ry. Co., I. R., 11 C. L. 109.

rule applied to a motion in the High Court for a new trial in a County Court action,¹ a new Rule has been framed by the Judges, which came into operation on the 24th of October, 1884, and which runs thus:—"On any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought, shall have power to draw all inferences of fact which might have been drawn in the Court below, and to give any judgment and make any order which ought to have been made. No such motion shall succeed on the ground merely of misdirection or improper reception or rejection of evidence, unless, in the opinion of the Court, substantial wrong or miscarriage has been thereby occasioned in the Court below."²

§ 1883. Besides these rules which apply principally to trials by jury, it must be borne in mind that the Court of Appeal is now clothed, by the Rules of the Supreme Court, 1883, with large powers for *amending* proceedings, and for receiving *further evidence*. These objects are attained by Order LVIII., Rule 4, which provides, that "the Court of Appeal shall have all the powers and duties as to amendments and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given *without special leave* upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted *on special grounds only*, and not without special leave of the court."

§ 1884. It has already been pointed out that, except in a case

¹ See and compare *Shapcott v. Chappell*, L. R., 12 Q. B. D. 58; 53 L. J., Q. B. 77, S. C.; and *Mathews v. Ovey*, 53 L. J., Q. B. 439; L. R., 13 Q. B. D. 403, S. C.

² Rules of Sup. Ct. Oct, 1884, R. 15, or cited as Ord. LIX., R. 7 of the Rules of 1883.

where serious injustice would otherwise be done, the Court of Appeal will, on questions of *amendment*, seldom interfere with the discretion of the court below.¹ Neither will the Court of Appeal, unless in an extreme case, reverse the decision of a judge on a question of fact, when he has arrived at a clear conclusion after hearing the witnesses; but this last rule only applies to cases where the judge's decision depends on the credibility of the witnesses as evinced by their demeanour, and not on inferences drawn by him from the facts deposed.² When an appellant wishes to adduce *further evidence* upon the hearing of an appeal, and that evidence consists of an affidavit or other document,³ he may, without any recourse to the court for leave, give notice to the respondent of his intention to apply at the hearing for permission to take such step;⁴ but if the party wishes to examine a fresh witness, he must apply for leave by motion before the hearing.⁵ The words "further evidence" mean any evidence not used at the trial or hearing in the court below. Provided it has not been so used, it falls within the rule, whether it be evidence altogether fresh, or evidence which has already been used in the same cause, or in any other cause between the same parties, and which might have been read at the trial had notice been given.⁶ The court will not grant permission to admit further evidence as a mere matter of course, but will act cautiously in the matter, and will generally require some strong reason to be given for invoking its interference.⁷ It will also, of course, be more ready to admit documentary evidence than oral testimony after the pinch of the

¹ *Golding v. Wharton Saltworks Co.*, L. R., 1 Q. B. D. 374, per Ct. of App. cited ante, § 229.

² *The Glannibanta*, L. R., 1 Pr. D. 283, 287, per Ct. of App.; *Bigby v. Dickinson*, 46 L. J., Ch. 280, 282, per James, Ld. J.

³ See *Dicks v. Brooks*, L. R., 13 Ch. D. 652, per Jessel, M. R., explaining *Hastie v. Hastie*, L. R., 1 Ch. D. 562.

⁴ *Hastie v. Hastie*, L. R., 1 Ch. D. 562, per Ct. of App.; 45 L. J., Ch. 283, S. C.; *Justice v. Mersey Steel Co.*, 24 W. R. 199. See, as to the practice in Ireland, *Long v. Donegan*, I. R., 7 Eq., 494.

⁵ *Dicks v. Brooks*, L. R., 13 Ch. D. 652, per Jessel, M. R.

⁶ *In re Chennell*, *Jones v. Chennell*, L. R., 8 Ch. D. 492, 505, per Jessel, M. R., in Ct. of App.; 47 L. J., Ch. 583, S. C.

⁷ *Id.*; *In re Weston's case*, L. R., 10 Ch. D. 579, per Ct. of App.; S. C. nom., *In re West Jewell Tin Mining Co.*, 48 L. J., Ch. 425.

case has been sustained; ¹ but still, it will be reluctant at any time to shut out any witness, who will probably be able to throw some genuine light upon the matter: ² and it will grant the application all the more readily, if there be any ground for assuming that the court below has been deceived or otherwise misled by the testimony given. ³

§ 1885.⁴ Having now completed the design of this Treatise, in § 1683 presenting a general view of the principles and rules of the Law of Evidence, the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labour from the manner of treatment: and will rise from the study of its principles, convinced, with Lord Erskine, that, with some few exceptions,⁵ “they are founded in the charities of religion,—in the philosophy of nature,—in the truths of history,—and in the experience of common life.” ⁶

¹ In re Coal Economising Gas Co., exp. Gover, 45 L. J., Ch. 95, per Ct. of App.; In re Weston's case, L. R., 10 Ch. D. 579, 582, 583, per Jessel, M. R.; S. C., nom., In re West Jewell Tin Mining Co., 48 L. J., Ch. 425.

² 2 Id.

³ Bigsby v. Dickinson, 46 L. J., Ch. 280, per Ct. of App.

⁴ Gr. Ev. § 584, in great part.

⁵ See Index, tit. “*Suggestions for amending the Law of Evidence.*”

⁶ 23 How. St. Tr. 966.

APPENDIX.

THE reader will find in § 1246 the following passage:—"The question as to what constitutes the reasonable costs and charges of a witness is now, so far as it relates to all the Divisions of the Supreme Court, happily set at rest by the formal adoption of a partially fixed scale of remuneration." When this sentence was written the Author had excellent ground for believing that, long before his Work should have passed through the printer's hands, a Rule would be promulgated by the judicial Committee appointed for that purpose, which,—in place of the four ill-drawn and inconsistent Scales hitherto respectively recognized in the different Divisions of the High Court,—would establish one Scale as applicable alike to all the Divisions. Unhappily some hitch has arisen in carrying out this very simple but much required legal Reform, and up to the present time no remedy for the evil has been officially supplied.

The Author, therefore, has no alternative left but to reprint the old Scales, which will be found below.

1st. The Scale recognized in the Common Law Division, as approved by the Judges in 1853 (see Reg. Gen., H. T., 16 V., 1 E. & B. App. lxxv.), is as follows:—

" ALLOWANCE TO WITNESSES.

	If resident in the Town in which the Cause is tried.	If resident at a Distance from the place of Trial
	£ s. d.	£ s. d.
"Common witnesses, such as labourers, journeymen, &c., per diem }	0 5 0	0 5 0 to 0 7 6
Master tradesmen, yeomen, and farmers, per diem from }	0 7 6 to 0 10 6	0 10 6 to 0 15 0

ALLOWANCE TO WITNESSES—*continued.*

	If resident in the Town in which the Cause is tried.	If resident at a Distance from the place of Trial
	£ s. d.	£ s. d.
"Auctioneers and accountants, per diem	{ 0 10 6 to	{ 0 10 6 to
Professional men, per diem	{ 1 1 0 1 1 0	{ 1 1 0 —
Professional men, inclusive of all, except travelling expenses, per diem	{ —	{ 2 2 0 to
Attorneys', or other clerks, per diem	{ 0 10 6	{ 3 3 0 0 15 0 to
Engineers and surveyors, per diem	{ 1 1 0	{ 1 1 0 to
Notaries, per diem	{ 1 1 0 1 1 0	{ 3 3 0 1 1 0
Gentlemen	{ with subpoena, but no daily allowance except after the first day, and then a reasonable sum for refreshment and conveyance.	{ 1 1 0 per diem.
Esquires		
Bankers		
Merchants		
Females, according to station in life, per diem from	{ 0 5 0 to	{ 0 5 0 to
Police inspector, per diem	{ 0 10 0 0 5 0	{ 1 0 0 0 7 6 to
Police constable	{ 0 3 0	{ 0 10 0 0 5 0 to
		{ 0 7 6

"If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only. The travelling expenses of witnesses, shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed 1s. per mile one way."

2nd. In the Chancery Division no Scale has been formally adopted, but that which is recognized in the Common Law Division has, in practice, to a certain extent been consulted, though apparently without any legal authority.

3rd. In Divorce and Matrimonial Causes the Scale recognized is nearly identical with the Common Law Scale, and need not therefore be here printed at length.

4th. In the Probate Division, the Scale is as follows:—

“WITNESSES’ EXPENSES.

“Allowance to Witnesses, per day, including their board and lodging, as between party and party.

	If resident within Five Miles of the General Post Office.	If beyond that distance.
	£ s. d.	£ s. d.
“Common witnesses, such as labourers, } journeymen, &c. }	0 5 0	0 7 6
Master tradesmen, yeomen, farmers, &c. }	0 10 0	0 15 0
Auctioneers and accountants }	1 1 0	2 2 0
Professional men, including notaries, } engineers, surveyors, &c. }	1 1 0	3 3 0
Clerks to attorneys or others }	0 10 6	1 1 0
Esquires, bankers, merchants, and gentle- } men }	1 1 0	1 1 0
Females, according to station in life }	0 5 0 to 0 10 0	0 7 6 to 1 0 0
Police inspectors }	0 7 6	0 10 0
Police constable }	0 5 0	0 7 6

“The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1s. per mile one way.” It will be seen that the above Scale is open to much comment

5th. In the Admiralty Division the Scale is as follows:—

“WITNESSES’ EXPENSES.

“Allowance to Witnesses, per day, including their board and lodging, as between party and party.

	If required to come a distance not exceeding Five Miles.	If a greater distance.
	£ s. d.	£ s. d.
“Common witnesses, as labourers, journey- } men, sailors, &c. }	0 5 0	0 7 6
Master tradesmen, yeomen, farmers, mas- } ters and mates of vessels, &c. }	0 10 0	0 15 0

WITNESSES' EXPENSES—*continued.*

	If required to come a distance not exceeding Five Miles	If a greater distance
	£ s. d.	£ s. d.
"Bankers, merchants, professional men, notaries, engineers and surveyors, auctioneers and accountants, &c. . . . from	1 1 0	1 1 0
Clerks to bankers, merchants, professional men and others	3 3 0	3 3 0
Esquires and gentlemen	0 10 6	1 1 0
Females, according to station in life	1 1 0	1 1 0
	0 5 0	0 7 6
	0 10 6	1 0 0"

The travelling expenses are the same as in the last preceding Scale.

The Scale is as follows in the County Courts:—

	s. d.	£ s. d.
"Gentlemen, merchants, bankers, and professional men, per diem from	15 0	to 1 1 0
Tradesmen, auctioneers, accountants, clerks, and yeomen, per diem from	7 6	to 0 15 0
Artisans and journeymen, per diem from	4 0	to 0 7 6
Labourers, and the like, per diem from	3 0	to 0 4 0

Travelling expenses, sum reasonably paid, but not more than 6*d.* per mile one way.

If the witnesses attend in more than one cause, they will be entitled to a proportionate part in each cause only." Cy. Ct. R. 1875, p. 237.

The above Scale is very injudiciously drawn up; for, first, by the adoption of a fluctuating amount of remuneration, it enables the Registrars, in taxing costs, to act with gross partiality,—it leads inevitably to the scandal of having different sums allowed in different courts,—and it may neutralise the compulsory effect of a subpœna, unless the witness has been supplied with conduct money calculated on the highest Scale; next, it contains no reference to female witnesses; and, thirdly, in courts which were specially established to protect the rights of the poor, it precludes the poor man from securing the testimony of his rich neighbour on his behalf, except at a cost which it is quite out of his power to pay. The Scale under the old County Court Rules, which awarded 7*s.* 6*d.* to gentlemen, &c., 5*s.* to tradesmen, &c., and 2*s.* to journeymen, &c., was incomparably better than the one now in force.

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